

June 18, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am happy to recommend Victoria Jones for a judicial clerkship. Victoria was a strong student in my Civil Procedure class in the fall 2021 semester, when I taught at the University of Alabama School of Law. I am also impressed by Victoria's engagement with the Alabama Law community, as illustrated by her involvement with several organizations, such as the Journal of the Legal Profession and as the Secretary of If/When/How. I believe that Victoria will make a fine law clerk, and I highly recommend her.

Victoria's exam in Civil Procedure demonstrates her analytic ability. She did a terrific job with issues of personal jurisdiction and the plausibility pleading standard from *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009). Although Victoria did not perform as well on the exam as I might have expected (she earned a B+), I feel confident that she has a strong understanding of the law of jurisdiction and procedure.

Victoria further showed her legal skills and fascination with the law through her engagement in and outside of class. During the fall 2021 semester, law schools continued to deal with the effects of the COVID-19 pandemic, and students were required to wear masks much of the fall semester. But Victoria did a great job participating even in this complex environment. In class, I use a Socratic method of teaching; I call on students at random (an approach I continued to use in this new teaching environment). Victoria was consistently ready to answer questions. She was also a frequent participant during office hours. We had many terrific conversations—about topics ranging from the Erie doctrine and *res judicata* to more general questions about the Supreme Court's approach to statutory interpretation. Victoria was particularly curious about the Court's increasing interest in textualism. Her fascination with the law will undoubtedly make her a strong addition to any judicial chambers.

If I can be of any more assistance, please do not hesitate to contact me, either by phone (w: 512-232-1363; c: 703-786-9731) or email (tgrove@law.utexas.edu). I wish you the best of luck with your selection process.

Sincerely,

Tara Leigh Grove
Vinson & Elkins Chair in Law
University of Texas School of Law

Tara Grove - tgrove@law.utexas.edu

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Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
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Dear Judge Creswell:

I write to recommend Victoria Jones for a clerkship in your chambers. Victoria was one of the best students in my Criminal Law class during her first year of law school. Victoria received an A- in the Criminal Law course—quite an accomplishment in a class with a 3.2 grading mean. Every time I have called on her in either of my classes, Victoria has been incredibly well prepared. She had seemingly thought through all the material and each question that I might pose. Victoria also wrote an excellent exam in my Criminal Law class that was substantively thorough and clearly written and organized. She is particularly good at carefully analyzing each piece of a statute—a skill that I saw on display both in the classroom and in her final exam.

My Criminal Law course focuses heavily on statutory interpretation and analysis, so I feel comfortable saying that Victoria's ability to interpret a statute and work carefully through complex legal analysis exceeds that of most of the students I have taught in a decade of teaching. Unlike in most first-year courses, my Criminal Law students rarely read judicial opinions. They instead read extensive fact patterns and numerous statutes. We then spend most of our class time parsing statutes and determining whether the government could satisfy its burden of proof on every element of each statute. Victoria was always incredibly well prepared for class. When I called on her, it was clear that Victoria had already worked carefully and methodically through each of the statutes and had considered in detail how each of the specific facts might support or undermine potential charges. Her answers were succinct yet comprehensive.

Victoria did an excellent job on the final exam in my Criminal Law class. Among the many strengths of her exam, her careful parsing of the statutory text particularly stands out. Because I agree with the criticism that Justice Scalia levied about the first-year law school curriculum being too grounded in common law and not enough in statutes, I teach a course and give an exam that is deeply grounded in statutes. I provide numerous statutes that can apply to each question, and students must work through them in detail.

One particularly impressive piece of Victoria's statutory analysis arose on the homicide question where I gave students a felony murder rule statute that included examples of inherently dangerous felonies followed by a residual clause. Many students ignored the examples of those inherently dangerous felonies. By contrast, Victoria's answer deployed the *eiusdem generis* canon quite effectively. She recognized that theft and rape committed by force or threat of force both involve force or threat of force applied directly to someone's person. She then explained that transporting drugs—the charge at issue in the exam fact pattern—does not involve similar force or threat of force applied directly to someone's person. It thus could not be a predicate felony within the meaning of that statute. Few students handled that statutory provision well, which is why Victoria's clear analysis stood out so much. Nonetheless, I was not surprised to see Victoria handle those statutes so well. She was similarly careful and effective at breaking down statutes and applying the facts when I called on her in class.

The first question of my final exam last Fall involved a minor in possession of a short-barreled rifle, and it required a lot of careful work with the specific language of various statutes to reach that conclusion. Victoria had one of the very highest scores on that question. To begin with, she recognized that I had used statutory language that made the length of the firearm a strict liability element; she quoted that statutory language to prove that point in her response. My students had not seen many strict liability elements all semester, but Victoria handled the strict liability language easily and persuasively. The relevant statute also used two different types of measurements that could make a gun short barreled—the length from bolt face to muzzle or the total length. There too, Victoria handled that statutory structure with ease despite the time pressure. She recognized that the two methods for measuring the rifle were separated by an "or," and she even emphasized the word "or" in her exam answer.

In addition to the strong substance of Victoria's final exam, her answer was extremely easy to read and grade because it was very well organized and clearly written. Under the time pressure of an exam, many students do not deliver very clear or organized work product, especially in the Fall of their first year of law school. Victoria's exam used headings and subheadings throughout to clearly separate each issue that she addressed. She used paragraph structure very effectively, ensuring that each paragraph addressed only a single point. Within that very clear framework, Victoria's writing was itself quite straightforward, clear, and concise. She very effectively triaged the numerous issues on the exam—dedicating most of her time to the closest questions and resolving the easy ones sometimes as quickly as in a single clear sentence. In so doing, Victoria showed excellent judgment and ability to sift through numerous arguments—a skill that I found quite important when I was a law clerk.

Victoria cares about precision in language—a theme that runs through her success in my class, her interest in contract work and contract law, and her interest in numerous statutory and business law courses in the law school curriculum. Victoria's favorite class during her first year of law school was Contracts; she likes the idea that effective contract drafting requires writing clearly enough that even non-lawyers can understand and comply with the language. I was very excited to learn that Victoria spent part of last summer working in-house doing contract review and researching contract law issues because that work builds so wonderfully on her interests and her skills. I am excited about the careful attention to language and organization that Victoria will bring to a clerkship and to the practice of law.

Victoria has been and continues to be a wonderful member of our law school community and our surrounding community. She

Russell Gold - rgold@ua.edu - 205-348-1139

has been active in several student organizations, and she volunteers at a local animal shelter.

It was a pleasure to have Victoria Jones in my class, and I am delighted to have this opportunity to recommend her. She will make an excellent law clerk. Victoria is a clear analytical thinker and writer; she is also an extremely nice and engaging person who is a pleasure to talk with. If I can provide you with any additional information, please feel free to contact me at 205-348-1139 or rgold@law.ua.edu.

Very truly yours,

Russell M. Gold
Associate Professor of Law
University of Alabama School of Law

Russell Gold - rgold@ua.edu - 205-348-1139

VICTORIA JONES

2311 5th St E
Tuscaloosa, AL 35404
307-299-4834
Victoria.jones@law.ua.edu

WRITING SAMPLE

The attached writing sample is the Seminar Paper I prepared for an Advanced Contracts Seminar in Spring of 2023. For my paper, I chose to conduct empirical research into mandatory arbitration, particularly its use in work contracts with low-wage employees. I was interested to see what people's understanding of arbitration was. This work has been reviewed by my seminar professor.

EMPLOYEE KNOWLEDGE OF ARBITRATION: AN EMPIRICAL ANALYSIS

Victoria Jones

Part I: Introduction

Modern contract law has come a long way from bartering in the town square over how many pieces of cheese your chicken was worth. Heated negotiations back and forth between two parties have largely been replaced in modern society by contracts of adhesion – that is, an agreement drafted by one party (or their legal team) and presented to the other on a take-it-or-leave-it basis.¹ Parties no longer negotiate terms or attempt to reach a common understanding about the contract. Rather, they usually check a box or click a button and become bound to a set of terms they almost certainly did not read.²

Currently, courts widely enforce contracts of adhesion, no matter how one-sided their terms appear to be.³ They expect consumers and employees to have read the terms of any contract they signed or agreed to; if they cannot read, courts expect that the consumer or employee will have someone read the terms to them.⁴ This is called the duty to read.⁵ While contracts of adhesion have given rise to the duty to read, it has been argued that even if the average person did read the terms of the contracts, they would either not be able to understand the terms or they would not fully comprehend the consequences of certain provisions.⁶

Criticisms of the duty to read have abounded in legal scholarship, but this paper is concerned with a narrow issue regarding one specific and common provision within adhesive contracts: mandatory arbitration in employment contracts.

¹ 1 Corbin on Contracts Desk Edition § 24.18 (2021).

² *Id.*

³ *Id.*

⁴ Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

⁵ *Id.*

⁶ *Id.*

Arbitration has become a preferred method of dispute resolution in the United States.⁷ Proponents of arbitration claim it is faster, cheaper, and less cumbersome than traditional litigation.⁸ They champion arbitration as the solution to a broken judicial system for people who may not otherwise have the ability to pursue meritorious claims.⁹ In theory, there were many benefits to arbitration that would make it more accessible than litigation. It is true that litigation poses many barriers to average American people.¹⁰ However, in practice, arbitration has made bringing claims even more challenging. Some of its perceived benefits cut against unsophisticated parties, such as low-wage employees. With the widespread use of adhesive contracts that often include arbitration provisions and the enthusiastic support of the courts in enforcing them, mandatory arbitration has become increasingly prevalent.

This paper will examine how much people actually know about the costs and benefits of arbitration. Specifically, I am interested to see if people understand what rights and privileges they are giving up when they consent to be subject to an arbitration provision. Going into the study, I hypothesized that even if people did read the terms they were subject to, they would not be aware of the effects arbitration has on the outcomes of cases.

Part II of this paper will examine a brief history of arbitration and discuss key statutes and cases that support its use and enforcement. This leads us to Part III, which explains the central issue of the paper: the disparity between the expected benefits of mandatory arbitration and the reality of how oppressive it is in practice. To research employee understanding of this issue, a survey was drafted on Qualtrics and distributed through Positly. The methodology used

⁷ Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 10.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.* at 3, 4.

and analysis of the results is discussed in Part IV. The survey was designed to test users' general knowledge of arbitration, their perceptions of the effects of arbitration, and understanding of their rights when they were subject to an arbitration clause.

Part II: Background

In order to understand how we arrived at broad use of arbitration and enforcement of mandatory arbitration agreements, it is important to observe how arbitration has developed in the United States and the role it plays in dispute resolution today. The federal statute governing arbitration agreements is the Federal Arbitration Act, which is discussed below. We will then look at two groundbreaking cases that drastically affected the use and enforcement of arbitration clauses in contracts of adhesion: *Concepcion* and *Epic Systems*.

A. The Federal Arbitration Act

Prior to 1925, courts generally disfavored arbitration as a means to settle disputes; it was sometimes recognized, but not preferred.¹¹ Arbitrators' authority was limited to specific issues, such as bankruptcy or admiralty law, and courts could (and did) freely choose not to bind parties to an agreement to arbitrate.¹² Due to mounting judicial hostility towards arbitration, Congress enacted the Federal Arbitration Act (FAA) in 1925.¹³

The FAA was designed to ensure that courts enforced arbitration agreements the same as other contracts. Congress required courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. Importantly, Congress directed courts to treat arbitration agreements as "valid, irrevocable, and

¹¹ Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

¹² DANIEL CENTNER AND MEGAN FORD, A BRIEF PRIMER ON THE HISTORY OF ARBITRATION, 2006.

¹³ 9 U.S.C.S. § 2.

enforceable.” This was meant to place arbitration agreements on the same footing as other contracts and ensure they were enforced against parties.

Over time, as the jurisprudence developed, it became clear that arbitrators had much more power than before. Federal courts were encouraged to interpret the FAA liberally, which resulted in arbitrators getting broad authority. For example, arbitrators could determine the validity of contracts at issue that had arbitration clauses. They could also determine whether a dispute fell within their jurisdiction to arbitrate in the first place. States did attempt to curb the reach of the FAA with their own legislation and courts, but these efforts were repeatedly struck down. Since laws that attempted to limit the scope of the FAA were held to be unenforceable, the use of arbitration became progressively more prevalent.

B. Concepcion:

Prior to the *Concepcion* case, state courts could refuse to enforce arbitration provisions if they felt that doing so was unconscionable.¹⁴ In weighing a decision, courts could look to a number of factors, such as the bargaining power of the parties, the amount of individual versus aggregate claims, and whether the result of enforcing the arbitration agreement was overly harsh or one-sided.¹⁵ If the court found that the overall result of the balancing test was that enforcing the arbitration agreement was unconscionable, it could simply refuse to hold the parties to the agreement and allow the claims to proceed in the judicial system.¹⁶

It is important to note that prior to *Concepcion*, this concept was the law in California (where the case originated). The state had enacted the Discover Bank Rule, which stated that class action waivers in consumer contracts of adhesion were unconscionable in cases where a

¹⁴ Discover Bank v. Superior Court, 36 Cal. 4th 148, 153 (2005).

¹⁵ AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

¹⁶ Discover Bank, 36 Cal. 4th at 153.

party with superior bargaining power was alleged to have cheated large numbers of consumers out of individually small sums of money.¹⁷ The state of California also reserved the ability to refuse to enforce any arbitration agreement or class action waiver if the court found that public policy weighed against upholding the agreement.¹⁸ In fact, the FAA was subject to similar unconscionability standards in other states.¹⁹

The lower courts ruled in favor of the plaintiffs.²⁰ They found that the FAA did not preempt the Discover Bank Rule because all contracts were subject to review for unconscionability; the rule was merely a refinement of this standard, so arbitration agreements were treated the same way as other contracts.²¹ Importantly, the FAA itself has a savings clause that states arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²² Many state courts believed (and federal appellate courts agreed) that the savings clause allowed the FAA and state unconscionability doctrines to coexist without preemption issues.²³

However, the Supreme Court disagreed with this interpretation. In a decision written by Justice Scalia, the Court said the FAA had clear and simple objectives; to ensure that agreements to arbitrate were respected and enforced by the courts.²⁴ The savings clause, Justice Scalia wrote, did not attempt to preserve states’ rights to interfere with these objectives.²⁵ In overruling the decision of the California state courts, the Supreme Court essentially held that the FAA superseded state laws that would allow arbitration clauses to be avoided by parties if they were

¹⁷ *Id.* at 156.

¹⁸ *Id.*

¹⁹ *See* 42 Pa.C.S. § 7303.

²⁰ *Concepcion*, 563 U.S. at 338.

²¹ *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (2009).

²² 9 U.S.C.S. § 2.

²³ *Concepcion*, 563 U.S. at 338.

²⁴ *Id.* at 344.

²⁵ *Id.*

unconscionable. The FAA's strong policy in favor of arbitration outweighed the state's interest in protecting consumers from unfair arbitration clauses.

After this case, states were no longer allowed to refuse to enforce arbitration agreements, no matter how unconscionable the agreements were. This has made it much more difficult for consumers to bring class action lawsuits against businesses. While the *Concepcion* case was controversial when it was decided, it has had a significant impact on the law surrounding arbitration. It is a clear example of the Supreme Court's commitment to enforcing the FAA's strong policy in favor of arbitration.

C. Epic Systems:

In the *Epic Systems* case, the court considered the issue of whether the National Labor Relations Act (NLRA) prevented arbitration agreements from precluding class actions in employment cases.²⁶ The NLRA protects workers' rights to engage in collective action, including the right to unionize and the right to engage in concerted activity for mutual aid or protection.²⁷ In this case, three employees attempted to sue their employers in class actions after their employers denied them overtime wages. All three employers had required their employees, including the plaintiffs, to sign arbitration agreements that required them to individually arbitrate any claims against the employer; class actions were prohibited.²⁸ In court, the plaintiffs argued that the NLRA prohibited class action waivers, so the contracts were not enforceable.²⁹

However, the court disagreed. It held that if employees signed an arbitration agreement with an employer, they were required to submit claims to arbitration and could not sue in

²⁶ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

²⁷ 29 U.S.C.S. § 151.

²⁸ *Epic Systems*, 138 S. Ct. at 1619, 1620.

²⁹ *Id.* at 1620.

courts.³⁰ The arbitration agreements would be upheld even if the employer required the employee to sign the agreement as part of their employment, as the plaintiffs in *Epic Systems* had. The Court thus held that arbitration agreements between employers and employees that require claims to be brought on an individual basis do not violate the NLRA because the NLRA does not specifically mention class actions or express disapproval of arbitration as a dispute resolution method for employment cases.³¹ The Court further held that the FAA requires courts to enforce such agreements as they are written. Thus, litigants in federal court were similarly left with no way to get out of an arbitration agreement. This case also extended the reach of mandatory arbitration to employees, not just consumers.

The impact of this case on workers' rights has been significant. It has made it more difficult for workers to hold their employers accountable for wage and hour violations, discrimination, and other workplace violations. It has also made it more difficult for workers to join together to negotiate better working conditions, wages, and benefits. The decision has also led to criticism that it favors employers over employees and may lead to a reduction in workers' bargaining power. The *Epic Systems* opinion itself, authored by Justice Gorsuch, alludes to the controversy: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written... Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."³²

The outcomes of the *Concepcion* and *Epic Systems* cases, taken together, have serious implications for both employees and consumers. Such plaintiffs attempting to bring suit against either a company or their employer no longer have a legal remedy in either state or federal court

³⁰ *Id.* at 1622.

³¹ *Id.*

³² *Id.* at 1632.

if they sign an arbitration agreement or a contract containing an arbitration clause. When read against the backdrop of adhesion contracts and the duty to read, no arbitration clause will be overturned by courts. Thus, its practice and use by large companies has increased exponentially.

Part III: The Issue

Perhaps mandatory arbitration could be tolerated if it delivered on its promise to make legal remedies more available to people who lack access to the judicial system. However, many empirical studies have demonstrated that this is not the case.

A. Problems With Arbitration:

Over time, with the more widespread use of arbitration as a means of resolving disputes, a few major problems have emerged.

One issue arising from arbitration is the closed record. Arbitration proceedings are entirely private, meaning the facts and witnesses the arbitrator considered in making their decision are not disclosed to the public. When arbitration first came to forefront of American dispute resolution, this was seen as one of its strengths. Now, it is more commonly viewed as a flaw. Because arbitration disputes are settled off the public record, arbitrators do not have established precedent to ensure consistent outcomes. It also allows employers and businesses to keep claims against them from being made public.

Further, most (if not all) arbitration agreements preclude class actions.³³ This means that plaintiffs with individually small claims cannot aggregate their claims into a collective action against a common defendant. Without class actions as a remedy, many consumers and employees with individually small claims would find bringing any action inefficient. The average wage theft

³³ Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 11.

claim is \$1,393.³⁴ This is almost a month's pay for the average retail cashier or housekeeper³⁵; yet, it is significantly lower than the costs of arbitrating a claim, which can reach tens of thousands of dollars from start to finish.³⁶ Thus, while employees could bring claims in theory, a simple cost benefit analysis would likely discourage them from pursuing a claim, even if they felt it had merit.

The repeat player problem has also emerged as a growing issue in arbitration. This refers to an employer's ability to choose the arbitrator who will hear any claims brought against them. As a result of the desire to generate repeat business with the employer, the arbitrator will increasingly rule in favor of the employer and against the employee. One study shows that the first time an employer appeared before an arbitrator, the employee had a 17.9% chance of winning, but after the employer had four cases before the same arbitrator the employee's chance of winning dropped to 15.3 percent, and after 25 cases before the same arbitrator the employee's chance of winning dropped to only 4.5 percent.³⁷

B. Arbitration versus Litigation:

First, while arbitration has been hailed as a low cost alternative to litigation, it may not be cost effective at all. In fact, arbitration usually carries far more required fees than state and federal courts. This means the overall costs associated with arbitrating claims are much higher than court fees. An initial filing fee in state small claims court ranges from \$30-200³⁸. Federal

³⁴ U.S. Department of Labor, Wage and Hour Division, *Data & Statistics*, <https://www.dol.gov/agencies/whd/data#:~:text=WHD%20investigations%20in%20fiscal%20year,for%20three%20weeks%20of%20work> (last visited Apr. 29, 2023).

³⁵ *Id.*

³⁶ Mark Fotohabadi, *How Much Does Arbitration Cost*, June 10, 2022, <https://www.adrtimes.com/how-much-does-arbitration-cost/>.

³⁷ Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*.

³⁸ STATE OF ALABAMA UNIFIED JUDICIAL SYSTEM: FEE DISTRIBUTION CHART (2015); *see also* NC JUDICIAL BRANCH: SMALL CLAIMS, <https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/small-claims> (last visited April 29, 2023).

court filing fees are \$350.³⁹ Courts have no other mandatory costs or fees, though the parties may incur costs related to litigating a case, such as travel and hiring legal counsel. In arbitration, initial filing fees are as low as \$1,000 and can be as high as \$4,300.⁴⁰ Parties in arbitration also pay additional fees for discovery and a hearing, which are usually in the hundreds of dollars, as well as ongoing administrative fees and the arbitrator's hourly fee, which can be as high as \$375 an hour.⁴¹ Some plaintiffs were also required to pay a \$2,750 fee per day to have a hearing.⁴² Additionally, most arbitration agreements contain fee-shifting provisions that may require the employee to cover certain costs or split them in half. Some fee-shifting provisions may impose all the costs of arbitration on the losing party (which is often the employee).

Damages awards in litigation are exponentially higher than those awarded employees in arbitration. A recent study shows a median of \$36,500 in damages is awarded under arbitration, compared to \$176,000 in federal courts and \$86,000 in state courts.⁴³ Another study with a different arbitration servicer suggests an even higher disparity: The average (mean) amount of damages awarded to plaintiffs in employment cases is \$23,548 in mandatory arbitration, \$143,497 in federal court, and \$328,008 in state court.⁴⁴

Further, employees are far less likely to win in arbitration than they are in litigation. Employee win rates in mandatory arbitration win only about 21.4 percent of the time, 59 percent of the time in the federal courts, and 38 percent of the time in state courts.⁴⁵ As a result of the

³⁹ UNITED STATES COURTS: U.S. COURT OF FEDERAL CLAIMS FEE SCHEDULE (2020).

⁴⁰ *Lucey v. FedEx Ground Package Sys.*, U.S. Dist. LEXIS 77454, at 6 (2007).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, <https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/>, last accessed March 1 2023.

⁴⁴ Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 20.

⁴⁵ *Id.*

low likelihood of success, over 98% of workers will abandon a claim against an employer rather than attempt to arbitrate the issue against them.⁴⁶ Only 2% of workers will actually proceed with a claim after they find out they are subject to an arbitration agreement.⁴⁷ This means that employers who violate the law are not held accountable to their employees or to society; they most often evade liability as well as any other significant consequences.

C. Effects on Worker's Rights

The increased costs of arbitration have not gone unnoticed by legal scholars, workers' rights groups, or consumer advocates. States are enacting laws to curb wage theft violations that could allow workers to bring suit on behalf of the state⁴⁸. Recently, the US Department of Labor has also sought to prosecute claims for workers who are subject to mandatory arbitration to ensure the law is sufficiently enforced against employers engaging in illegal practices.⁴⁹

However, little recourse outside arbitration is available for workers themselves. It is estimated that 65% of low wage employees (those making \$13 or less an hour) are subject to mandatory arbitration clauses as well as 56% of all non-union private sector employees.⁵⁰ Overall, mandatory arbitration is estimated to affect over 60 million workers in the United States.⁵¹ Should these workers become victims of wage theft, discrimination, or harassment, they would have no legal recourse besides arbitration, where they face almost certain defeat.

⁴⁶ Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, <https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/> (last visited April 29, 2023).

⁴⁷ *Id.*

⁴⁸ Chris Marr, *Wage Violations Targeted in Latest State Legislative Proposals*, BLOOMBERG LAW, June 28, 2022, <https://news.bloomberglaw.com/daily-labor-report/wage-violations-targeted-in-latest-state-legislative-proposals>.

⁴⁹ U.S. Dep't of Labor, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, (Mar. 20, 2023, 2:43 PM), <https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law#:~:text=And%20because%20many%20mandatory%20arbitration,now%20subject%20to%20mandatory%20arbitration>.

⁵⁰ *Id.*

⁵¹ *Id.*

It is estimated that wage theft costs US employees over \$15 billion a year⁵². Most of this money will never be recovered and provided to the employees who earned it because the costs of bringing a claim outweighs the amount of the money they lost.

Further, there is evidence that the number of forced arbitration for both consumers and employees increased during the COVID-19 pandemic.⁵³ As the number of arbitrations went up, the employee win rates went down to only 5.3%.⁵⁴ From 2019 to 2020 alone, the number of forced arbitrations increased 17%.⁵⁵ While 60 million employees are currently subject to mandatory arbitration agreements, only 82 employees won cases in 2020.⁵⁶ Top corporate defendants in mandatory arbitration claims include Family Dollar, Chipotle, and Macy's.⁵⁷ While some companies have started to move away from mandatory arbitration agreements, other companies (including Tesla) embrace the practice now more than ever.⁵⁸

Thus, we can see that the practice of mandatory arbitration in the workplace is stronger than ever and has grown in strength and scope since *Concepcion* and *Epic Systems*.

Part IV: Empirical Analysis

Traditionally, for contract terms to be enforceable, the parties should reach a “meeting of the minds,” or generally know and understand what the terms of the contract are.⁵⁹ This school of doctrine has essentially been replaced by the duty to read, as courts hold that even a small indication of consent is sufficient to bind the parties.⁶⁰ However, I believe that even if people did

⁵²Katie Lester, *Forced Arbitration Robs Workers Billions in Wages*, CENTER FOR PROGRESSIVE REFORM BLOG, February 4, 2021, <https://progressivereform.org/cpr-blog/forced-arbitration-robs-workers-billions-wages/>.

⁵³ American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. Rev. 2255 (2019).

⁶⁰ *Id.*

read the terms of adhesion contracts, they would probably be unaware of the legal consequences of certain provisions. While arbitration clauses can have drastic effects on one's legal rights post-*Concepcion* and *Epic Systems*, I suspected that most people were unaware of these effects, such as lower damages awards, decreased chances of winning, and higher required costs and fees.

This finding could be significant because it undermines the meaning of the duty to read; while the duty to read assumes that people are able and willing to read contractual terms, simply reading them would be pointless if one does not understand the legal effects of what they are agreeing to. The duty to read has been used as a proxy for consent; but how could one consent to terms they lack fundamental knowledge of. Alternatively, if people do understand what agreeing to arbitration means for their potential claims, it could indicate that perhaps arbitration is a smaller issue than scholars make it out to be. If people walk into arbitration agreements with full knowledge of it, they have knowingly and understandingly consented to be bound. While terms such as arbitration may be unfavorable to employees, they do have the right to enter into whatever contracts they choose.

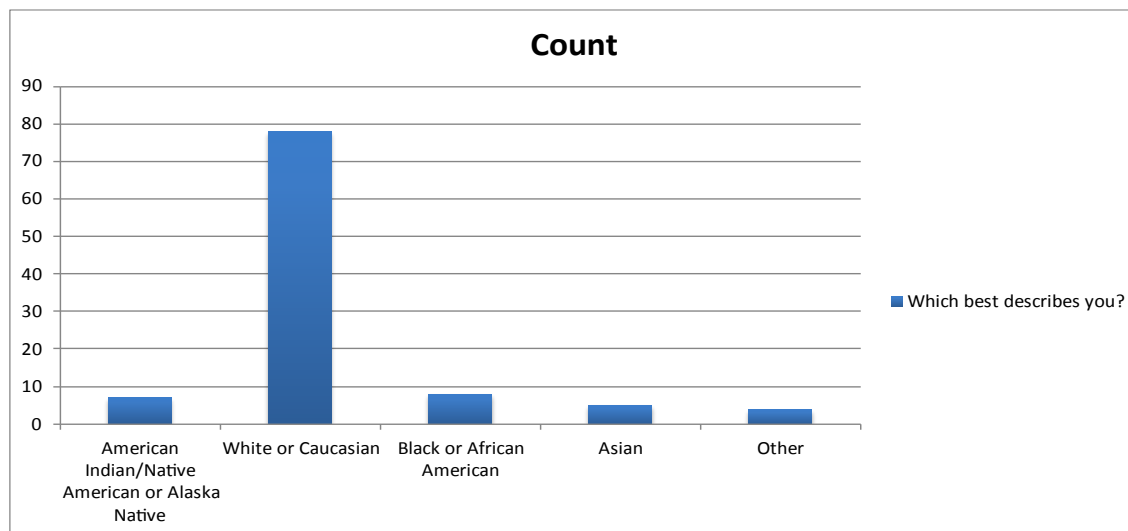
A. Methodology:

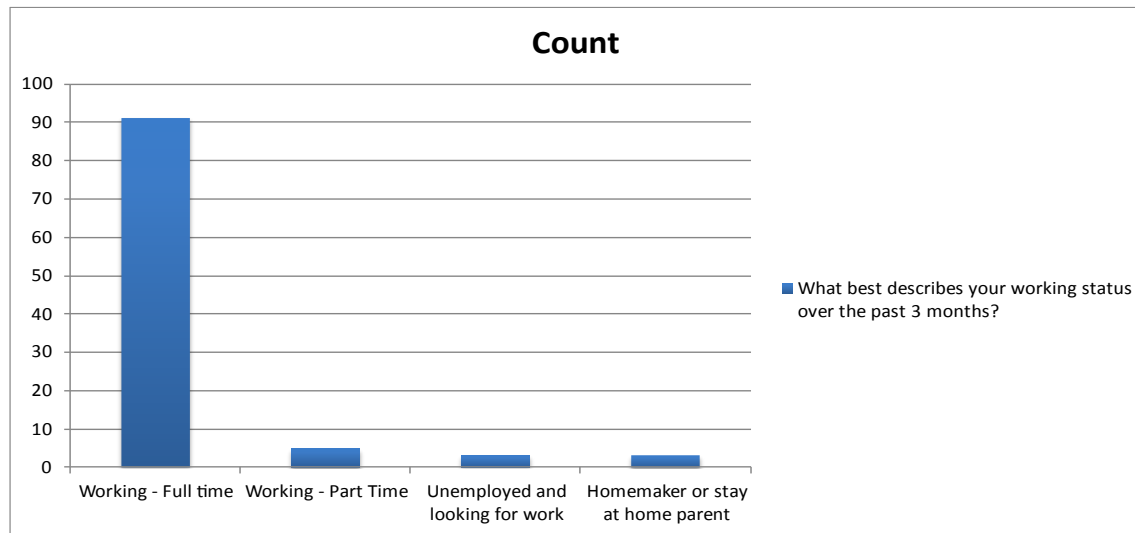
The purpose of the study was to determine if people understood the consequences of arbitration clauses and how such provisions affected their rights. There were two possible outcomes: one possibility was that people knew what agreeing to arbitration provisions meant, and they willingly accept these consequences when they signed contracts containing these clauses; the other possibility was that people did not fully understand the implications of agreeing to arbitration and thus enter into such agreements without knowing the consequences of doing so.

To conduct the research, I first wrote survey questions on Qualtrics. The survey had key questions about arbitration itself as well as questions where the respondents compared arbitration directly to litigation. The survey was then published on Positly. From Positly, people who agreed to participate in the study were rerouted to the Qualtrics page, where they completed the survey. Qualtrics collected all the answers and organized the data into reportable results.

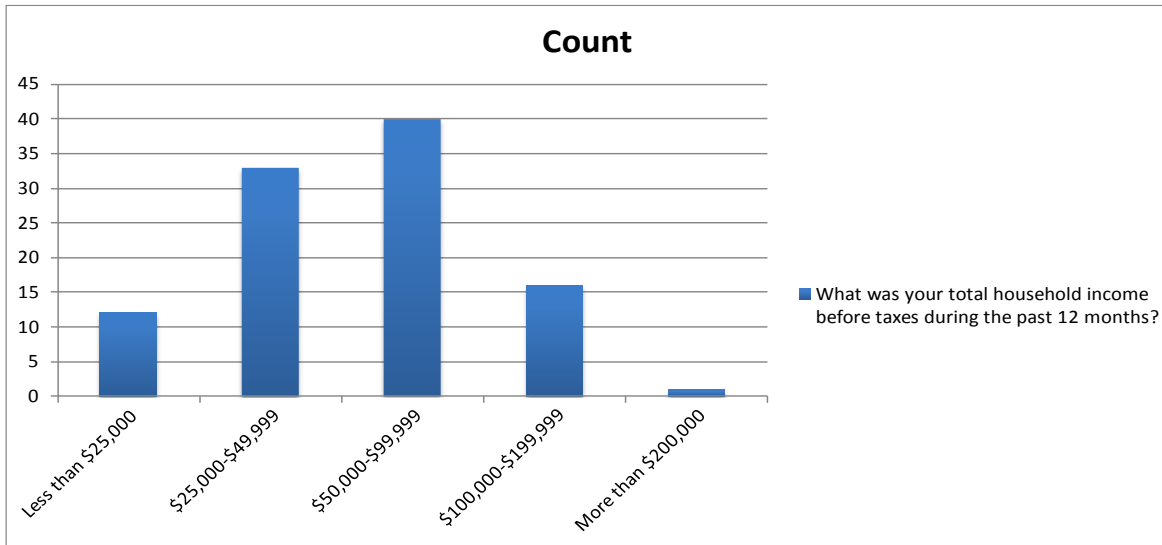
B. Results:

We recruited a total of 89 respondents to respond to the survey. While this is a small sample size, the findings demonstrate important issues regarding employees' understanding of arbitration. In terms of demographics, many survey respondents (53%) had a bachelor's degree or above. 89% of the respondents were working full-time. The respondents were skewed Caucasian (76.5%, compared with the 57% national average). Additionally, the respondents were 57.8% male and 42.2% female.

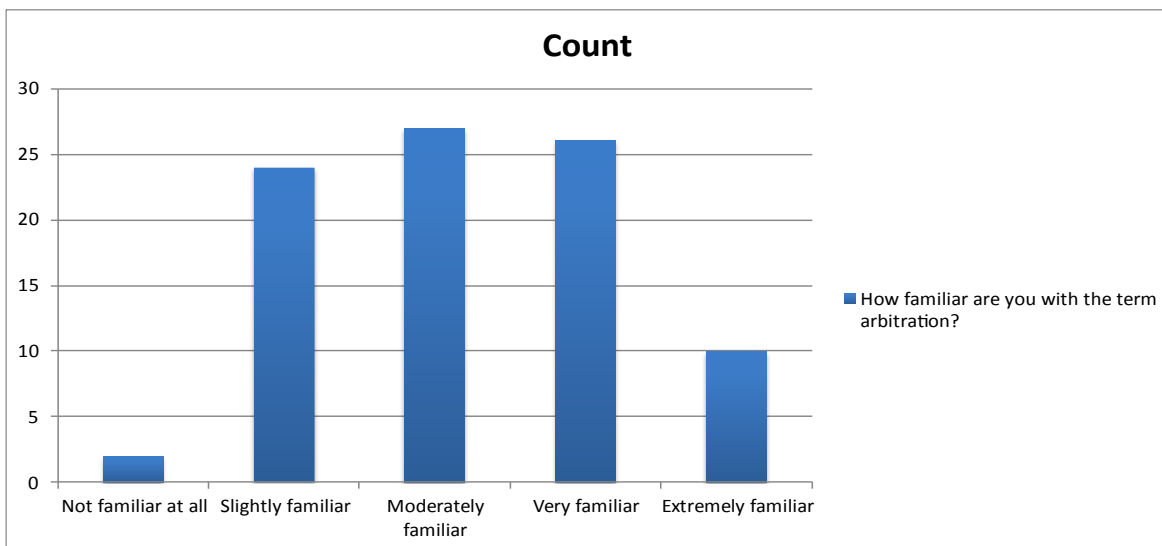




Additionally, the respondents mostly had average or below average income, with 83.4% reporting income under \$100,000. Mandatory arbitration affects millions of workers who largely lack the resources to challenge their employment contracts or raise a claim against an employer in arbitration. It is also very likely that our respondents are either currently subject to arbitration agreements under their current employers or have been subject to mandatory arbitration in the past. The responses they provided are therefore very valuable; we had the opportunity to learn from employees affected by arbitration agreements themselves.



We asked the respondents how familiar they were with the term arbitration. We also asked the respondents to describe what they thought arbitration was in their own words. For the most part, the respondents seemed confident in their own knowledge of arbitration, with most of them (97.8%) indicating some level of familiarity with the term.



Answers to the free-response questions indicate the respondents also seemed to generally understand what arbitration was. For example, one respondent wrote: “Arbitration resolves disputes outside the judiciary courts.” Another wrote: “Using a 3rd party to settle a dispute.” Another replied: “Settling a dispute by an independent third party.” While these are only a few examples, the responses taken as a whole showed that in general, people are aware of the fundamentals function of arbitration. The descriptions are also neutral; no one indicated a strong preference either for or against arbitration.

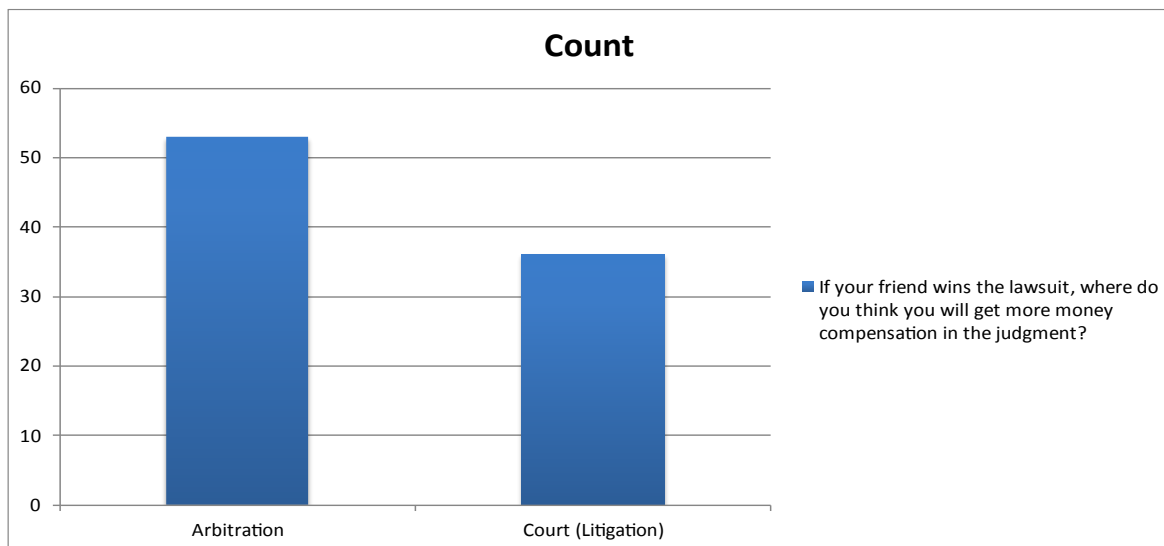
However, in another free response question, when presented with an arbitration clause and asked to explain what it meant, the respondents fell short of accuracy. This means they may lack a basic knowledge of what the language was conveying. The arbitration provision read:

“Any controversy or claim arising out of or relating to this Agreement or the parties' dealings shall be settled by arbitration in the City of New York, NY, in accordance with the then-governing rules of the American Arbitration Association. If such organization ceases to exist, the arbitration shall be conducted by its successor, or by a similar arbitration organization, at the time a demand for arbitration is made. The decision of the arbitrator shall be final and binding on both parties. Judgment upon the award rendered may be entered and enforced in any court of competent jurisdiction.”

One respondent said: “If you have an issue, you need to engage in arbitration with the company or it's [sic] successor in NYC to come to a binding outcome.” Another wrote: “If a disagreement happens between the two parties then the issue will be settled outside of court (arbitration) by the arbitration organization listed.” However, many respondents wrote “n/a” or

“nothing,” suggesting they either could not read or did not understand the arbitration provision. It could also mean they didn’t read the provision closely enough to extract its meaning.

Further, when asked specific questions about arbitration, the respondents seemed to collectively stumble. First, the respondents believed that arbitration would result in higher money damages being awarded to a successful claim. They were presented with a hypothetical situation regarding a friend who is subject to an arbitration agreement, and then asked where they believed the friend would win the most money.

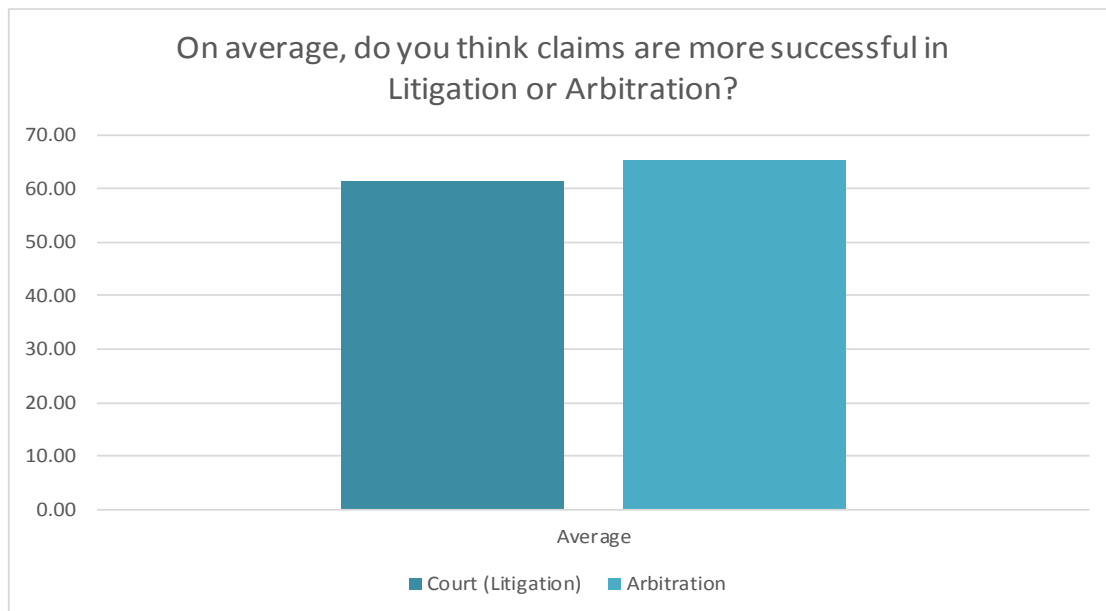


The respondents also thought claims fared slightly better in arbitration than in traditional litigation. On average, the respondents believed court cases were successful for plaintiffs in wage theft claims 61% of the time in litigation and 65% of the time in arbitration. This can be compared to actual win rates: plaintiffs succeed in wage theft claims in federal court 59% of the time⁶¹ and only 5.3% of the time in arbitration.⁶² While the respondents were fairly accurate in

⁶¹ Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 20.

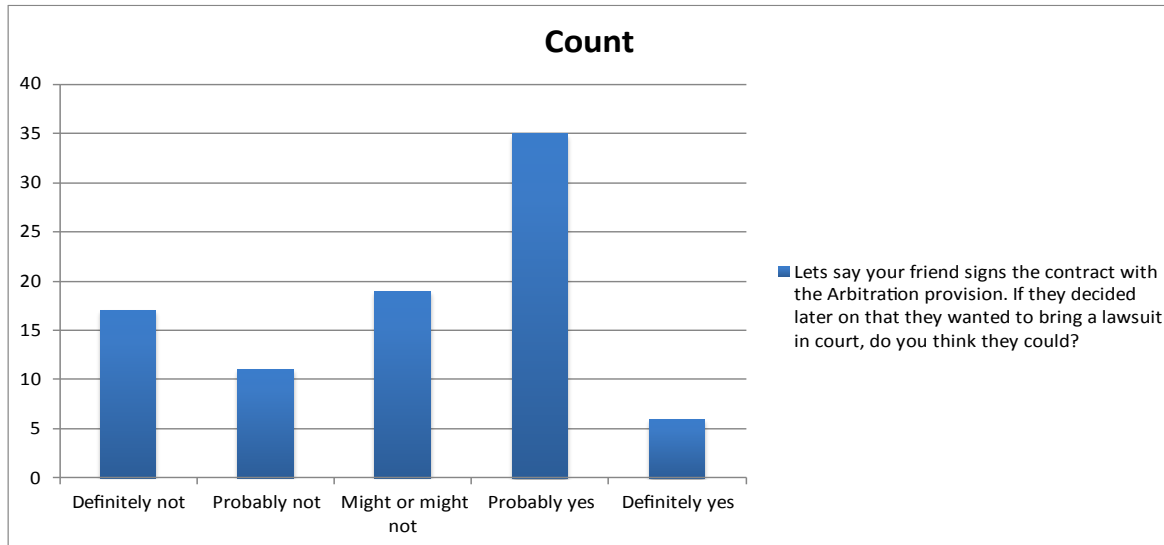
⁶² American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

predicting their likelihood of success in litigation, they drastically missed the mark on arbitration. Perhaps more importantly, they believed as a whole that their chances were better in arbitration, while this has been shown to not be the case.



One of the more surprising results was that the respondents did not seem to realize that arbitration clauses foreclosed the possibility of bringing a lawsuit in court. When asked if they believed whether or not they could bring a lawsuit in court while subject to an arbitration agreement, most of the respondents indicated they thought they could, with the most common answer being “probably yes.” As we have observed from the case law, this is inaccurate. The Supreme Court has held that the FAA mandates arbitration if the parties agreed to it.⁶³ This was a rather troubling discovery, as it is completely incorrect given current precedent.

⁶³ *Epic Systems*, 138 S. Ct. at 1632.



C. Analysis

The study shows that most people have significant misconceptions about the costs and benefits of arbitration as an alternative dispute resolution method. While this was a smaller study, and the findings are not technically statistically significant, they do raise several red flags. They support the second possibility identified earlier: that people don't fully understand the implications of agreeing to arbitration and thus enter into such agreements without knowing the consequences. As a whole, the results demonstrate that people's beliefs about the consequences of arbitration clauses are out of line with reality.

Overall, the respondents seemed to think that arbitration was generally more employee-friendly than traditional litigation. This stands in stark contrast with the common criticism of arbitration being exceedingly corporate-friendly. The respondents as a group were incorrect about the required costs of arbitration relative to litigation, how likely plaintiffs are to win claims, and the amount of damages they could expect to recover if they brought a successful claim for wage theft. Perhaps most importantly, they did not believe that an arbitration clause

precluded them from bringing a lawsuit in court. The expectation of litigation being an available remedy even with the presence of an arbitration provision speaks volumes. This shows a deep misunderstanding of the goals of arbitration provisions and the policies promulgated by the FAA (and supported by the Supreme Court) itself.

I think the results show a disconnect between what people think about arbitration and what arbitration does in practice. They indicate that people are not nearly as wary of arbitration as they should be. As long as these perceptions continue, large companies can continue to use this dispute resolution method to avoid accountability for violating the law while people remain oblivious – that is, until or unless they are faced with bringing a claim.

I would argue that this lack of basic understanding of arbitration weighs strongly in favor of returning to an unconscionability standard for arbitration agreements, or at least subjecting them to some level of judicial scrutiny. This issue goes beyond the duty to read. While the duty to read requires several assumptions about one's ability and willingness to read the terms of a contract, the results from this study suggest that reading the contract would do little to no good. The respondents here were confident in their understanding of arbitration, yet they were mistaken about the real implications of such an agreement. Had they been presented with the arbitration provision in the survey, they would have readily agreed to the terms with the full belief that they were likely better off pursuing claims in arbitration and not in court. This raises the issue of whether the parties have truly consented to be bound by such unfavorable terms, or whether they rather just didn't have the bargaining power to dispute the terms at the outset of the contract formation. This is exactly what the *Discover Bank* rule sought to prevent.⁶⁴

⁶⁴ *Discover Bank*, 36 Cal. 4th at 153.

Also, the Court in *Epic Systems* said that Congress was free to amend the NLRA at any time to preclude class action waivers.⁶⁵ In light of the increased amount of wage theft that has occurred in the years since *Epic Systems*, I think the legislature should amend the statute accordingly. Individual claims are unlikely to succeed and are not cost effective; employees need the remedy of collective action if they are to successfully hold their employers accountable for breaking the law.

This survey strongly indicates that parties who agree to be bound by arbitration agreements have several key misconceptions about arbitration. While the courts have declined to offer judicial remedies, I would recommend as a matter of policy that companies begin to settle claims outside of arbitration, at least for small claims (i.e. anything less than \$10,000). Some companies have bowed to social pressure regarding harassment claims, and others have moved away from forced arbitration entirely.⁶⁶ If the country is going to try to meaningfully combat wage theft, employees themselves need to be empowered to seek legal action themselves in small claims court. Small claims are governed by states and generally require low filing fees.⁶⁷ Claims are also typically straightforward enough to not require hiring legal counsel.⁶⁸

Further, while states have traditionally been prevented from countering the FAA, I think their own legislation for combating wage theft should be honored if any come to fruition. Should states themselves take action against corporations, corporate defendants would be less able to avoid liability. Some examples of proposed state remedies include allowing employees to sue

⁶⁵ *Epic Systems*, 138 S. Ct. at 1630.

⁶⁶ American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

⁶⁷ NC JUDICIAL BRANCH: SMALL CLAIMS, <https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/small-claims> (last visited April 29, 2023).

⁶⁸ *Id.*

employers on behalf of the state and empowering state labor boards to pursue prosecution and increased damages for companies that violate wage theft laws.⁶⁹

Part V: Conclusion

While the court has held that the law regarding mandatory arbitration is clear, they conceded that the policy debate was far from over.⁷⁰ Moving forward, this research should help inform policy decisions that could enable smaller parties to hold their employers accountable for wage theft violations. Not only is there a massive problem concerning wage theft that affects thousands of workers a year, there are inadequate judicial remedies to help employees enforce their rights. The research conducted here shows that employees lack the knowledge to contest arbitration provisions themselves; they lack basic knowledge of the consequences of agreements to arbitrate claims. Situations such as this call for legal action, either from courts or legislators. In the future, courts must support any effort to combat the wage theft issue.

⁶⁹ Chris Marr, *Wage Violations Targeted in Latest State Legislative Proposals*, BLOOMBERG LAW, June 28, 2022, <https://news.bloomberglaw.com/daily-labor-report/wage-violations-targeted-in-latest-state-legislative-proposals>.

⁷⁰ *Epic Systems*, 138 S. Ct. at 1632.

Applicant Details

First Name **Catherine**
 Middle Initial **G**
 Last Name **Kinley**
 Citizenship Status **U. S. Citizen**
 Email Address kinleg21@wfu.edu

Address

Address
Street
7723 Athens rd
City
Stokesdale
State/Territory
North Carolina
Zip
27357
Country
United States

Contact Phone Number **3364306892**

Applicant Education

BA/BS From **University of North Carolina-Chapel Hill**
 Date of BA/BS **May 2021**
 JD/LLB From **Wake Forest University School of Law**
<http://www.law.wfu.edu>
 Date of JD/LLB **May 20, 2024**
 Class Rank **15%**
 Law Review/Journal **Yes**
 Journal(s) **Wake Forest Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Stanley Moot Court Competition**
Wake Forest Law Moot Court Board
Member
Walker Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial Law
Clerk **No**

Specialized Work Experience

Recommenders

Taylor, Margaret
taylormh@wfu.edu
(336) 758-5897
Boike, Elise
ekboike@gmail.com
(248) 622-3477
Schang, Scott
schangs@wfu.edu

References

Jesse Williams
(336) 251-3876
williajb@wfu.edu,

Grady McCallie
(919) 802-7592
grady@ncconservationnetwork.org,

Pamela Harrigan-Young
(919) 809-7990
pamela@phylaw.com

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

June 13, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am writing to apply for a clerkship in your chambers beginning in 2024, or during a later term. I am a rising third-year student at Wake Forest University Law School, where I actively contribute to the *Wake Forest Law Review* and Moot Court team. I have attached a resume, law school grade sheet, writing sample, and list of references.

What sets me apart as an applicant is my unique perspective as a first-generation college student. Growing up in an environment where higher education was not a common path, I have cultivated a strong work ethic, resilience, and resourcefulness that have been instrumental in my academic achievements. This background allows me to approach legal issues with a fresh and empathetic perspective, making me well-suited for the challenges of a clerkship.

Being a native of the South, I possess a deep connection and strong commitment to the Southern community. It is my earnest aspiration to contribute to the legal landscape by practicing law in the South. A clerkship in your chambers would provide me with an invaluable opportunity to gain firsthand experience and make a positive impact on the South's legal system.

I am particularly drawn to the clerkship opportunity within your chambers due to my involvement in bankruptcy litigation in my current summer associate position. This experience has instilled in me a strong desire to gain practical experience and develop a comprehensive understanding of the intricacies of bankruptcy law. Moreover, I will expand my knowledge by enrolling in my school's bankruptcy course this upcoming semester.

Professors Scott Schang and Margaret Taylor as well as attorney Elise Boike have submitted separate letters of recommendation on my behalf. If there is any other information that might be helpful, please let me know. I would welcome the opportunity to interview with you. Thank you for your consideration.

Sincerely,

Grace Kinley

Grace Kinley

Winston-Salem, NC
Kinlcg21@wfu.edu | (336)430-6892

EDUCATION

WAKE FOREST UNIVERSITY SCHOOL OF LAW

Juris Doctor Candidate, May 2024

GPA: 3.655, Class Rank: 22/151 (Top 15%)

Honors: *Wake Forest Law Review* Staff Member; Dean Reynolds Award Recipient in Torts (Highest Grade); George K. Walker Moot Court Competition (Top 16); Pro Bono Honor Society

Activities: Teacher's Assistant Position: Torts; Moot Court Board Member; Edwin M. Stanley Moot Court Competition; UNC Townsend Trial and Zeff Trial Competitions; Transactional Law Competition; Environmental Law Clinic; Part-time Library Desk and IT Help Desk Assistant

Pro Bono: Project Coordinator for Immigration Pro Bono Project; Wills, Expungements, Know Your Rights, Healthcare Advocacy

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

Bachelor of Arts, *cum laude*, May 2021

GPA: 3.619

- Major in Political Science, Major in Peace War and Defense, Minor in History
- Study Abroad: Burch Field Research Seminar in the U.K. and Ireland

LEGAL EXPERIENCE

RAYBURN COOPER & DURHAM, P.A. – Charlotte, NC

Summer Associate May 2023 – August 2023

- Researched a variety of legal issues including bankruptcy issues and contract disputes
- Managed large document review projects
- Assisted with litigation and mediation preparation
- Drafted blog posts summarizing recent NC Business Court decisions for RCD's "Business Court Blast"

LAKESHORE LEGAL AID – Detroit, MI

Summer Law Clerk: May 2022 – August 2022

- Appeared in the 36th District Court before the Honorable Judge Ruth Ann Garrett
- Provided legal representation to low-income tenants during nonpayment and termination of tenancy hearings
- Conducted intakes to ensure tenants' eligibility for nonprofit services
- Performed legal clerical work – created spreadsheets with party, compliance, and lawsuit status information
- Drafted legal documents, communicated directly with clients, and completed legal research and trial preparation

LEGAL AID OF NORTH CAROLINA – Pittsboro, NC

Intern: March 2020 – June 2020

- Organized a pro bono wills clinic with the Marian Cheek Jackson Center and Orange County Bar Association
- Coordinated wills and end-of-life document drafting for low-to-moderate-income residents
- Partnered with Attorney, Erin Haygood, shadowing her in court and assisting her with tasks and organization

OTHER EXPERIENCE

CAROLINA POLITICAL REVIEW – Chapel Hill, NC

Staff Contributor: August 2020 – May 2021

UNC CALL CENTER – Chapel Hill, NC

Student Caller: September 2018 – March 2020

VARIOUS RESTAURANTS – Chapel Hill and Greensboro, NC

Server/Hostess: October 2016 – August 2021

(/StudentSsb/)

Kinley, Grace

View Grades

Student Grades - Kinley, Grace (06628562)

All Terms Law

GPA Summary

View Details

-	3.655	-	3.655
All Terms	Institutional	Transfer	Overall

Course Work

Search by Course Title or Subject Code (OPTION+Y)

Subject	Course Title	Campus	Midterm Grade	Final Grade	Attempted Hours	Earned Hours	GPA Hours	Quality Points	CRN	Term	Action
LAW 595, 1P	Law Review	LW		P	2.000	2.000	0.000	0.000	14366	Spring 2023	
LAW 690, 1P	Environmental Law Clinic	LW		H	4.000	4.000	0.000	0.000	25642	Spring 2023	
LAW 442, 1	Sales & Secured Transactions	LW		A-	3.000	3.000	3.000	11.010	27331	Spring 2023	
LAW 534, 1	Intellectual Property	LW		A-	3.000	3.000	3.000	11.010	28218	Spring 2023	
LAW 508, 1	Family Law	LW		A-	3.000	3.000	3.000	11.010	29133	Spring 2023	
LAW 200, 1	Legislation and Admin Law	LW		A	3.000	3.000	3.000	12.000	60061	Fall 2022	
LAW 207, 1	Evidence	LW		A	4.000	4.000	4.000	16.000	60065	Fall 2022	
LAW 209, 1	Constitutional Law II	LW		A-	3.000	3.000	3.000	11.010	60066	Fall 2022	
LAW 219, 1	Appellate Advocacy LAWR III	LW		A-	2.000	2.000	2.000	7.340	60067	Fall 2022	
LAW 595, 1P	Law Review	LW		CR	0.000	0.000	0.000	0.000	60389	Fall 2022	
LAW 512, 1	Environmental Law	LW		B+	3.000	3.000	3.000	9.990	61463	Fall 2022	
LAW 120, 4	Constitutional Law I	LW		A-	3.000	3.000	3.000	11.010	10025	Spring 2022	
LAW 105, 4	Civil Procedure II	LW		B+	3.000	3.000	3.000	9.990	19836	Spring 2022	
LAW 119, 4A	Legl Analysis, Writng & Res II	LW		A	2.000	2.000	2.000	8.000	19837	Spring 2022	
LAW 111, 4	Property	LW		A-	4.000	4.000	4.000	14.680	19838	Spring 2022	
LAW 102, 4	Contracts II	LW		A-	3.000	3.000	3.000	11.010	22554	Spring 2022	
LAW 122, 4A	Professional Development	LW		A*	1.000	1.000	0.000	0.000	23456	Spring 2022	
LAW 113, 4A	LAWR II (Research)	LW		B+	0.500	0.500	0.500	1.665	25608	Spring 2022	

5/27/23, 5:45 PM

Student Grades

Subject	Course Title	Campus	Midterm Grade	Final Grade	Attempted Hours	Earned Hours	GPA Hours	Quality Points	CRN	Term	Action
LAW 104, 4	Civil Procedure I	LW		A-	3.000	3.000	3.000	11.010	98877	Fall 2021	
LAW 101, 4	Contracts I	LW		B+	3.000	3.000	3.000	9.990	98879	Fall 2021	
LAW 103, 4	Criminal Law	LW		B+	3.000	3.000	3.000	9.990	98881	Fall 2021	
LAW 108, 4	Torts	LW		A+	4.000	4.000	4.000	16.000	98883	Fall 2021	
LAW 110, 4A	Legl Analysis, Writing & Res I	LW		B+	2.000	2.000	2.000	6.660	98886	Fall 2021	
LAW 112, 4A	LAWR I (Research)	LW		B+	0.500	0.500	0.500	1.665	98890	Fall 2021	
LAW 122, 4A	Professional Development	LW		S	0.000	0.000	0.000	0.000	98894	Fall 2021	



Margaret H. Taylor
Professor of Law

Telephone: (336) 758-5897
FAX: (336) 758-4496
Email: taylormh@wfu.edu

June 2, 2023

Letter of Recommendation for Clerkship Applicant Catherine (Grace) Kinley
JD Candidate, Wake Forest University School of Law, 2024
Uploaded via OSCAR

Dear Judge:

I am writing to recommend Catherine (Grace) Kinley to be your judicial clerk. Grace is a member of the Class of 2024 at Wake Forest University School of Law. She is in the top fifteen percent of her class and has an impressive list of extracurricular activities, which includes being named to the Wake Forest Law Review and the Moot Court Board. Importantly, Grace accomplished this while holding down several part-time jobs during the school year (including as a Library Desk and IT Help Desk Assistant). Similarly, as a first-generation college student who graduated *cum laude* from the University of North Carolina at Chapel Hill in 2021, Grace worked throughout her undergraduate career to support herself as an undergraduate student.

Grace was a student in my Torts class in her first year of law school, and out of forty-two students in my class that year I selected her to be my Teaching Assistant the following year. I knew that Grace would be an excellent role model and mentor to 1L students; I also had the utmost confidence in her substantive knowledge, analytical ability, work ethic, and stellar interpersonal skills. Grace's work last year far exceeded my expectations. She helped to create a community among our first-year students, provided support to and answered questions from 1Ls, and gladly said "yes" to each request from me. Grace consistently met deadlines and took appropriate initiative, and overall was an excellent TA.

I recommend Grace to be your judicial clerk with tremendous enthusiasm. I believe she would be a real asset to your chambers. Please do not hesitate to contact me if I can provide any additional information.

Sincerely,

A handwritten signature in blue ink that reads 'Margaret H. Taylor'.

Margaret H. Taylor
Professor of Law

June 12, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am very pleased to recommend Grace Kinley for a clerkship position in your chambers. I am a staff attorney at Lakeshore Legal Aid and was fortunate to work directly with Grace during her 2022 Summer Internship with our organization. One of the chief reasons I believe Grace to be a strong candidate for your team is her ability to intuit what needs to be done- I'd often find that Grace had completed something before I'd even have a chance to task her with it. Grace was also an invaluable member of our team due to her willingness to assist others in our department and her interest in becoming involved in various projects. Grace regularly offered to step in and assist other legal assistants, law clerks and attorneys in their tasks, in addition to completing her own assignments and tasks.

Additionally, Grace was extremely organized, prompt and eager to learn more. She eagerly accepted every opportunity offered to her in order to grow and experience as much as possible. Our department specifically defends indigent tenants facing eviction in Detroit. Grace worked daily with clients who often had complex legal and social issues pertaining to their case, and Grace treated each client with respect and care. She listened carefully and thoughtfully and regularly identified legal issues in our clients' cases. Grace brought enthusiasm, humor and intelligence to her internship, and she would be a wonderful addition to your office. I am confident in her ability and the future lawyer she will become.

Please do not hesitate to reach out to me with any questions.

Thank you,

Attorney Elise Boike
Lakeshore Legal Aid

Elise Boike - ekboike@gmail.com - (248) 622-3477



March 31, 2023

To Whom It May Concern:

I write to heartily recommend Grace Kinley for a judicial clerkship. Grace was a student in my Environmental Law class and is currently a clinician in the Environmental Law and Policy Clinic. I have been lucky to interact with Grace over the past year, and she is one of the strongest overall students I have had at Wake Forest.

Grace is one of those students who can surprise you. She can be quiet and unassuming, but she often contributes the most insightful and helpful comments in class and in Clinic. As a clinician, she has shown herself to be a consummate teammate, working hard to keep her matters on track and her fellow students on task. Grace has worked on an heirs' property matter this semester where her contributions were singled out by our law fellow, Jesse Williams, as among the strongest in the Clinic. Grace has also worked on an environmental matter this semester where her teammate has not pulled her weight, but Grace has kept her composure, ensured the client still receives the best advice, and undertaken excellent research and counseling.

Grace is a thoughtful person who can be underestimated because of her quiet, self-deprecating manner. But if I were selecting a student to work with me over the summer to keep our matters running smoothly, Grace would be my go-to student. Her ability to master research, write well, and work well with others make her the kind of well-rounded law student who will excel in practice.

If you have any questions or would like further information, please do not hesitate to contact me at 202-674-6076 or schangs@wfu.edu.

Sincerely yours,

A handwritten signature in black ink that reads 'Scott E. Schang'.

Scott E. Schang
Professor of Practice
Director, Environmental Law & Policy Clinic

Grace Kinley
Winston-Salem, NC
Kinlcg21@wfu.edu
(336) 430-6892

Writing Sample

As a second-year student at Wake Forest University School of Law, I prepared the attached brief for my Appellate Advocacy Course. I wrote the brief in support of reversing the grant of summary judgment to a school that punished a student for exercising his First Amendment rights by wearing a political T-shirt. My professor permitted me to use this brief as a writing sample.

RECORD NO. 22-823

*In the
United States Court of Appeals
for the Sixth Circuit*

GAVIN PAINTER, by and through his father, DONALD
PAINTER,
Plaintiff-Appellant,

v.

AMY DOYLE, SUPERINTENDANT; EDISON MAGNET
MIDDLE SCHOOL; and DAYTON PUBLIC SCHOOL
SYSTEM,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
OHIO

BRIEF OF APPELLANT

Grace Kinley

ISSUE PRESENTED

- I. Under *Tinker*, which allows schools to prohibit speech that causes disruption or risk of disruption, can a school administrator discipline a student that did not cause an actual disruption for creating a potential risk of disruption without providing a constitutionally valid justification for anticipating disruption?

ARGUMENT

This Court should reverse the district court's decision because Gavin's speech was not disruptive to the School's educational mission. Gavin brought this action by and through his father, Donald Painter, under 42 U.S.C. § 1983, which provides a cause of action for individuals when a person acting under color of law violates their constitutional rights. 42 U.S.C. § 1983. The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment applies the First Amendment to the states and "protects the citizen against the State itself and all of its creatures—Board of Education not excepted." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Students' rights to freedom of speech must be carefully protected "if we are not to strangle the free mind at its source." *Id.* at 507. While students' constitutional rights in school are not "coextensive with the rights of adults in other settings," the classroom is a "marketplace of ideas" that requires the freedom to engage in a robust discussion of ideas and viewpoints. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986);

Id. at 512. Although school officials can limit student speech, schools must show a constitutionally valid reason for doing so. *Fraser*, 478 U.S. at 682; *Tinker*, 393 U.S. at 511. Generally, for a school’s prohibition of student speech to be sustained, the school must show that the forbidden conduct “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars* 363 F.2d 744, 749 (5th Cir. 1966)).

There are three exceptions to this general rule. First, schools have the discretion to prohibit speech, without a showing of disruption, if the speech is “lewd, indecent, or offensive.” *Fraser*, 478 U.S. at 683. Second, if the speech at issue is school-sponsored, then the school may regulate it “so long as their actions are reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Finally, a school may restrict speech reasonably viewed as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

Both parties have stipulated that Gavin’s shirt was not school-sponsored speech, nor was it advocating illegal drug use, so these exceptions are not at issue here. The remaining issue is whether the School had a constitutionally valid justification for suppressing Gavin’s speech under the standard in *Tinker*. Gavin’s shirt did not materially and substantially interfere with the operation of the School. Accordingly, the School did not have a constitutionally valid justification to prohibit Gavin’s speech, and the district court erred in granting the School’s Motion for

Summary Judgment. Therefore, this Court should find in favor of Gavin and reverse the district court's decision.

I. The district court erred in holding that Gavin's shirt materially and substantially interfered with the School's operation because Gavin's shirt did not cause any disruption, and the School did not show a constitutionally valid reason to forecast such a disruption.

Gavin's shirt did not materially and substantially interfere with the School's operation because it did not cause an actual substantial disruption, and the School did not show a constitutionally valid reason to forecast disruption. While school officials have a limited ability to suppress disruptive speech, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 507–08. To prohibit student speech under *Tinker*, a school must show that a substantial disruption occurred or demonstrate specific facts that led the school to reasonably forecast a substantial disruption. *Id.* at 514. Here, no substantial disruption occurred, and the School did not demonstrate specific facts that support a reasonable forecast of disruption. Accordingly, Gavin's shirt did not materially and substantially interfere with the operation of the School.

A. The district court erred in holding that Gavin's shirt caused a material disruption because it did not disrupt classwork or invade the rights of others.

Gavin's shirt did not cause an actual substantial disruption because the shirt did not disrupt classwork or invade the rights of others. A substantial disruption "disrupts classwork or involves substantial disorder or invasion of the rights of

others” *Id.* at 513. A display of speech invades the rights of others when it leads to threats or acts of violence. *Id.* at 508.

In *Tinker*, school officials suspended students who wore black armbands to school when they refused to remove them. *Id.* at 504. Since only a few students wore the armbands, there was no indication that they disrupted class. *Id.* at 508. Although some students made hostile remarks to the students wearing the bands, there were no threats or acts of violence. *Id.* The Supreme Court held that since the armbands did not interfere with school work nor “concern aggressive, disruptive action or even group demonstrations,” the speech was a “silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Id.* Therefore, the armbands did not constitute a material and substantial disruption, and the school officials could not constitutionally prohibit them. *Id.* at 514.

Here, Gavin’s shirt did not constitute an actual material disruption because it did not cause interference with school work. In *Tinker*, the armbands did not interfere with school work because they were a silent, passive expression of opinion. Likewise, Gavin’s shirt did not interfere with school work because it was a silent, passive expression of opinion. Further, in *Tinker*, the armbands did not disrupt class because only a few students wore them. Similarly, Gavin did not disrupt class because he was the only student wearing the shirt. Gavin did not behave disruptively because he individually and silently walked into class wearing a shirt that expressed his political opinion. While Gavin’s shirt did change the class topic for the day, this change was beneficial, not disruptive. Cook reserves part of her

class time for current events, and the School takes pride in encouraging students to discuss issues respectfully. Gavin's shirt did not interfere with school work because Cook used the shirt as an opportunity to further the school's mission and provide a forum to respectfully discuss immigration.

Further, Cook did not end her class early because of any disruption caused by Gavin's shirt. Cook made the last twenty minutes of class a study hall so she could call Doyle. While the call may have interfered with class time, Gavin did not cause the interference. The class was engaging in a respectful discussion, but Cook still called Doyle to prevent her from being surprised and looking bad on camera. Cook's personal decision to protect Doyle's image was responsible for the shorter class time, not Gavin's shirt. Gavin's shirt did not interfere with school work because it contributed to a beneficial class discussion on a topic that was relevant to the curriculum of the class and aligned with the School's educational mission.

Additionally, Gavin's shirt did not constitute an actual and substantial disruption because it did not invade the rights of others. Here, like the facts in *Tinker*, there were no threats or acts of violence; however, like the facts in *Tinker*, some students reacted with hostility to the students wearing the armbands, here, the School interpreted some students' responses to Gavin's shirt to be hostile. Reyes was the only student to refer directly to Gavin's shirt as "creepy." Reyes did later slap Gavin but stated that this was for reasons unrelated to the shirt. The School perceived some students to be pointing and saying things like "creep" and "weirdo" to Gavin but did not know if his shirt caused the comments. Even if it were clear

that the students were directing their comments at Gavin's shirt, these comments did not equate to threats or acts of violence. Since Gavin's shirt, at worst, caused hostile remarks from other students, it did not lead to threats or acts of violence. Because the shirt did not lead to threats or acts of violence, it did not invade the rights of others and, therefore, did not constitute an actual and material disruption.

Furthermore, Doyle did not cancel the Judge's talk because of material disruption. Doyle canceled the talk before she even arrived at the auditorium or saw Gavin's shirt. She did not rely on observing an actual disruption as her basis for canceling the talk since she did so before she arrived. While Doyle thought a disruption occurred in Cook's class based on their phone call, this was a misunderstanding. Cook told Doyle that Reyes had slapped Gavin but did not provide context as to why. Doyle relied on this slap as evidence of Gavin's shirt being disruptive when the slap was actually for unrelated reasons. Doyle canceled the talk based on a misunderstanding, not based on Gavin's shirt causing any disruption. Thus, a substantial disruption was not the basis for the cancellation. Gavin's shirt did not cause an actual disruption because the shirt neither interfered with school work nor invaded the rights of others.

B. The district court erred in finding that Gavin's shirt caused a reasonable forecast of material disruption because the School did not show a specific and constitutionally valid reason to anticipate a disruption.

The School did not show a specific and constitutionally valid reason to anticipate a material disruption. To prohibit student speech without an actual disruption, a school must show specific and constitutionally valid reasons to

anticipate that the prohibited speech would substantially interfere with the school's functioning. *Id.* at 509–511. While school officials do not have to wait until a disturbance occurs, the prohibition of speech based on a forecast of disruption must be reasonable and “caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 510.

The School did not show a specific and constitutionally valid reason to forecast a substantial disruption because Doyle based her forecast on a distant and unrelated incident. When a school seeks to prohibit speech based on prior incidents, it must “point to a particular and concrete basis for concluding that the association is strong enough to give rise to a well-founded fear of genuine disruption.”

Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 257 (3d Cir. 2002)

(holding that, despite experiencing a pattern of disturbing racial incidents, a school was unjustified in prohibiting a student from wearing a shirt with the word redneck because the school did not show that the association between the prior instance and the shirt was strong enough).

Here, like the school in *Sypniewski*, which prohibited the shirt with the word redneck based on the school's history of disturbing racial incidents, Doyle based her ban of Gavin's shirt on a prior incident in which a group of students disrupted school by bringing nude paintings to school. In *Sypniewski*, a disturbing pattern of racial incidents was insufficient to support a school's prohibition of shirts with a race-related term. In that case, there was a relationship between the prior instances

and the School's prohibition because racial terminology could contribute to disturbing racial incidents. But here, there is no meaningful relationship between Gavin's shirt and the prior students' nude paintings. Here, the prior event involved nudity and a group of students, while Gavin's shirt was a silent display of a political opinion, and he was the only participant. The School's basis for prohibiting Gavin's shirt is even less concrete than the school's basis in *Sypniewski*. Accordingly, the prior incident of disruption that Doyle used to justify her forecast of disruption is not a constitutionally valid reason to forecast disruption.

Further, the School did not show a specific and constitutionally valid reason to forecast a substantial disruption because the school unreasonably assumed that Gavin's silent display of opinion would substantially interfere with the School's operation. Passive expression of one's viewpoint through clothing is not inherently disruptive and, therefore, cannot be suppressed absent a constitutionally valid reason to anticipate that it would lead to disruption. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992). In *Chandler*, school teachers went on strike, and in response, the school hired replacement teachers. *Id.* At 526. Students wore buttons in protest that referred to the replacement teachers as "scabs." *Id.* The Court held that although the buttons could be considered insulting to the teachers, the school officials could not have reasonably forecasted that they would disrupt the school's operation because the students silently conveyed an opinion in a non-disruptive manner. *Id.* at 530.

Here, Gavin's act of wearing a shirt, like the act of wearing a button in *Chandler*, was a way of silently expressing an opinion in a non-disruptive manner. The buttons in *Chandler* could have been insulting to the teachers. Likewise, Gavin's shirt could have insulted the Judge; however, this potential for insult did not support a reasonable forecast of disruption in *Chandler* and also did not support a reasonable forecast of disruption here. Judges have experience being around people who may disagree with their viewpoints. Here, the Judge would most likely not have even been insulted by a child's shirt, and even if he did take issue with it, he certainly would have kept his composure and not caused a material and substantial disruption. Concern that Gavin's political expression may be insulting is insufficient justification for forecasting a substantial disruption.

Also, the age of the students in the auditorium was not a constitutionally valid reason to anticipate a substantial disruption. *See Fraser*, 478 U.S. at 683 (holding that the maturity of the students exposed to speech is relevant in determining if it is appropriate for school officials to prohibit the speech). Doyle feared Gavin's shirt may have caused a disruption because sixth-grade students were in the auditorium. This forecast is unreasonable because the School is for exceptional students, has a rigorous admission process, and prides itself on teaching the students respect. The rigorous admission process means that only great students attend this school. A room full of exceptional students who survived a rigorous admission process and received lessons on respecting others' views would not become disruptive simply because they saw a shirt.

Because of the exceptional maturity of even the youngest sixth graders, there was no need for concern about the shirt affecting them. The students most likely would not have been affected by Gavin's shirt, and accordingly, the age of these students was not a constitutionally valid reason to anticipate a substantial disruption. Neither the prior unrelated incident, the potential insult to the Judge, nor the age of the students in the auditorium is a constitutionally valid justification for anticipating a material disruption. Therefore, the School did not show a specific and constitutionally valid reason to anticipate that Gavin's shirt would cause a substantial disturbance and the District Court erred in granting the School's Motion for Summary Judgment.

CONCLUSION

For the reasons stated herein, appellant respectfully requests that the Court reverse the district court's decision.

This is the 12th day of October, 2022.

Grace Kinley

Applicant Details

First Name **Ross**
 Middle Initial **W**
 Last Name **Martin**
 Citizenship Status **U. S. Citizen**
 Email Address rosswmartin@gmail.com

Address
Address
Street
36 Kensington Rd
City
Garden City
State/Territory
New York
Zip
11530
Country
United States

Contact Phone Number **19297991863**
 Other Phone Number **5168779028**

Applicant Education

BA/BS From **Grinnell College**
 Date of BA/BS **December 2002**
 JD/LLB From **Other**
<http://www.lawschool.edu>
 Date of JD/LLB **June 30, 2012**
 LLM From **University of California at Los Angeles (UCLA) Law School**
 Date of LLM **July 19, 2014**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Oxford University Commonwealth Law Journal**
Pacific Basin Law Journal
Southampton Student Law Review
 Moot Court Experience **Yes**
 Moot Court Name(s)

Bar Admission

Admission(s) **New York**

Prior Judicial Experience

Judicial Internships/
Externships **Yes**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Specialized Work
Experience **Appellate**

Recommenders

Dillon, Michael
mickdill@hotmail.com
Snelling, Juliana
jsnelling@canterburylaw.bm
Jayousi, Areen
areen.jayousi@gmail.com

References

Please see attached.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 15, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

Thank you for giving me the opportunity to submit these materials in application for the judicial clerkship for which you are currently recruiting. I believe I would be the ideal candidate for this position.

I have had a diverse career in commercial litigation and arbitration over the past six years, much of it with considerable international elements. I have excelled in oral and written advocacy, and have been entrepreneurial in identifying law firms in considerable need of assistance, enabling me to take up different positions around the world while building a profile in international arbitration.

I recently completed the courses necessary to become a Fellow of the Chartered Institute of Arbitrators in London, which I was named this past September. These courses are designed to enable a fellow to sit as an arbitrator in a commercial dispute. In particular, Module 3, "Award Writing", is designed to teach the candidate how to draft an arbitral award, and I performed admirably in this course, drafting a strong award capable of surviving judicial scrutiny.

Over the course of completing this course, I realized that my main goal in my legal career is to sit as a judge or as an arbitrator, and it is to that end that I am submitting this application for a judicial clerkship in your chambers. I believe I am a strong advocate for clients, but I believe my real talents lie in the equanimous application of the law.

I have taken the liberty of including the arbitral award I drafted last summer. This award far exceeds any page limit, but I think that it, more than anything I have ever written, demonstrates my ability to draft a reasoned judgment of the sort that I would be expected to draft in your chambers. In other words, as your clerk, I would be able to hit the ground running.

Best regards,

Ross W. Martin

Ross W. Martin

rosswmartin@gmail.com – +1 929 799 1863 – Citizenship: USA

Bar Admissions

- **New York.** Attorney. April 2016.
- **England and Wales.** Solicitor. November 2019. Current practicing certificate.
- **Astana International Financial Centre.** Rights of Audience. September 2021.
- **Washington State.** Attorney. January 2022.
- **England and Wales.** Barrister. Date of call: July 2022. Non-practicing.

Education

Chartered Institute of Arbitrators. International arbitration courses. 2021-2022. All three Modules complete. Admission to Fellowship (FCIArb): September 2022.

University of California, Los Angeles, School of Law. Master of Laws, 2014 – 2015. Concentration in American business law. Managing Editor: UCLA Pacific Basin Law Journal. Moot Court Honors Program.

University of Oxford. Bachelor of Civil Law (a highly advanced, post-J.D., common law degree), 2012 – 2014. Concentration in English and European commercial law. Associate Editor: Oxford University Commonwealth Law Journal.

University of Southampton. Bachelor of Laws (equivalent to a J.D.), 2010 – 2012. First Class Honours. Editor-in-Chief: Southampton Student Law Review.

University of British Columbia. Master of Arts. European Studies, 2004 – 2006.

Grinnell College. Bachelor of Arts. History and Western European Studies, 1998 – 2002.

Experience

Hecht Partners. New York. *Senior Counsel.* July 2022 – present. Commercial litigation, international arbitration, and investor-state dispute settlement. Engaged in research, drafted memos and briefs, managed own workload with little supervision, supervised one paralegal.

- Played important role in large investment dispute brought under bilateral investment treaty against a country in Central Europe. Conducted research concerning claims settlement treaties, *res judicata* effect of national judicial decisions in international law, legality requirement under bilateral investment treaty. Contributed text to reply brief on jurisdiction.
- Played important role in large investment dispute brought under Energy Charter Treaty against a country in Central Europe. Conducted research concerning expropriation, fair and equitable treatment standard.
- Played central role in large series of arbitration proceedings involving multiple claimants against a not-for-profit entity at AAA and JAMS.

Horizons & Co. Dubai. *Senior Associate.* July 2021 – July 2022. International arbitration and commercial litigation. Construction, commercial, company, and investment disputes. Undertook knowledge management project for firm. Managed one associate and three paralegals.

- *Construction Arbitration:*
 - Full care and conduct for medium-scale construction arbitration from start to finish without supervision. Drafted statement of claim, reply, costs submissions. Undertook correspondence with tribunal.
 - Played important role in large multi-party construction dispute pursuing encashment of performance bonds. Contributed significant work regarding back-to-back clauses.
 - Played important role in matter successfully resisting injunction preventing encashment of six performance bonds.
 - Drafted legal notice, notice of dispute, injunction application, and draft penal order in commercial construction dispute.
 - Drafted opinion, legal notice in large retail shopping mall dispute.
 - Contributed research, drafting to reply in construction dispute worth \$80 million.
- *Commercial Arbitration:*
 - Full care and conduct for international corporate arbitration from start to finish without supervision. Drafted statement of claim, reply, costs submissions. Undertook correspondence with tribunal
 - Drafted injunction application, statement of case, affidavit, and draft penal order for important UAE ports facilities dispute.
- *Other:*
 - Contributed to Expert Opinion regarding UAE bankruptcy law. Provided answers to twenty-one specific inquiries and general matters. Principal responsible for most drafting elements.
 - Participated in representation of discharged employee in large employment mediation. Interviewed client, drafted and prepared most material relied upon.

Canterbury Law Limited. Bermuda. *Contract legal consultant.* July 2020 – June 2021. Associate-equivalent role completed remotely from New York due to COVID-19 pandemic. Undertaken on contract/per matter basis while taking courses in business and finance.

- *International insurance.* Participated in large insurance-industry arbitration concerning status of several insurance policies and status of Chief Underwriting Officer of an international insurance company. Drafted 150-page witness statement for CEO. Contributed heavily to submissions.
- *Employment.* Participated in several important employment disputes, including senior management and members of government. Drafted employee manuals, policy documents, and revised employment contracts incorporating legislative changes.

Urbanetic. Phnom Penh/Singapore. *Contract legal consultant.* February 2020 – June 2020. Advised multi-million-dollar block-chain software regarding smart cities project in Phnom Penh.

BNG Legal. Phnom Penh. *Legal counsel.* August 2019 – February 2020. Legal counsel at international law firm until COVID-19 outbreak. Managed General Practice and Myanmar teams, working exclusively for international clients. Broadened transactional experience while maintaining focus on international litigation. Engaged in substantial business development efforts.

- *Myanmar practice.* Engaged in substantial research concerning Myanmar company, investment, and commercial law. Participated in company registration in Myanmar. Engaged in research concerning company dispute in Myanmar. Participated in the sale of two ships from a Myanmar entity to an international entity.
- *Cambodian disputes practice.* Engaged in Cambodian litigation concerning a casino; engaged in Cambodian litigation concerning property disputes; participated in arrest of ship in Cambodian waters. Developed materials relating to international arbitration, including Cambodia's National Commercial Arbitration Centre.
- *Cambodian transactional practice.* Engaged in several land transactions; incorporation of non-profit entities; engaged in substantial research concerning mining industry of Cambodia; engaged in substantial research concerning arbitration and dispute resolution in Cambodia.

Adrian & Associates. New York. *Associate.* March 2018 – April 2019. Associate at boutique commercial litigation firm practicing complex commercial litigation, appellate litigation, securities class action defense, insurance coverage, corporate disputes, and alternative dispute resolution including arbitration. Clients include both international and domestic entities. Developed practical skills in litigation: drafting pleadings, motions, memoranda of law, stipulations, affidavits, attorney affirmations, discovery requests, oral argument on motions, and settlement conferences. Gained extensive experience in New York state and U.S. federal practice.

- *Securities Fraud.* Participated in the defense of President of Services in the *Oklahoma Firefighters Pension and Retirement System v. Xerox Corporation* class-action case heard at the Second Circuit Court of Appeals. Drafted extensive memorandum concerning the application of Federal Rule of Civil Procedure §12(b)(6) motions to dismiss.
- *Insurance Coverage.* Engaged in research and all procedural steps involved in successive appeals to the Appellate Division First Department and the New York Court of Appeals concerning the requirement of a finding of proximate causation by the primary insured before additional insured status can be claimed in regards to the duty to defend under an insurance policy.
- *Corporate litigation.* Held primary responsibility for a case concerning the formation of a small company and its alleged fraudulent misappropriation by several of its shareholders. Contributed to drafting of complaint. Drafted memorandum of law in opposition to motion for summary judgment and reply briefs.
- *Employment.* Drafted opposition to motion for summary judgment and reply briefs in case concerning termination of employment of a legal executive. Case concerned alleged mutual mistake and rectification of contract.
- *Appellate litigation.* Created documents initiating appeal in a case concerning pollution from the September 11, 2001, terrorist attacks. Drafted extensive memorandum concerning exclusion of liability for injuries caused by pollution. Participated in subsequent settlement negotiations, ultimately reducing client's liability significantly.
- *Arbitration.* Contributed research to extractive industry arbitration in Saudi Arabia.

McNair Chambers. Doha, Qatar. *Associate.* February 2017 – December 2017. Associate at prominent barristers' chambers practicing international commercial litigation, international commercial arbitration, investor-state dispute settlement, and public international law. Contributed research to several high-worth international arbitrations at ICSID, ICC, LCIA, QICCA and arbitrations under UNCITRAL rules, and researched UNCLOS rules. Contributed to several particulars of claim. Attended conferences, engaged in research for publication.

- *Public International Law*. Participated in the *Jadhav* case heard at the International Court of Justice in 2017. Researched law on consular access, clean hands doctrine, provisional measures in public international law. Additionally, conducted research on the Falkland Islands dispute.
- *Mining and extractive industries*. Engaged in research related to international investment law, mining of metals, political and social conditions in Pakistan, mining valuation and quantification.
- *Insolvency and Fraud*. Produced report on the cooperation between the Serious Fraud Office of the United Kingdom and authorities in an offshore jurisdiction concerning a multi-national insolvency and fraud case in the financial industry.
- *International investment*. Participated in initial stages of an arbitration related to expropriation, fair and equitable treatment, full protection and security concerning an investment in the Caribbean. Drafted demand letter and request for arbitration.
- *Arbitration Act 1996*. Examined implications of the recent *IPCO* decision by the UK Supreme Court concerning adjournment of proceedings in several cases.
- *Telecommunications*. Produced report on competition law issues regarding entrance into Qatari market, use of existing infrastructure. Contributed to draft of particulars of claim.
- *Shipping*. Researched issues relating to force majeure clauses in the shipping industry following the blockade on Qatar. Engaged in research related to US sanctions on Iran. Worked on arbitration related to loading dispute, participated in taking and drafting of witness statement.
- *Hospitality*. Researched issues related to enforcement of arbitral award of tribunal seated outside of the UK in English High Court and Court of Appeal related to the construction of a hotel in a third jurisdiction.

Deloitte. Jersey City, New Jersey. *Contract attorney*. April 2016 – February 2017. German-language document review pertaining to the Volkswagen Emissions Scandal. Learned management aspects of the automotive industry. Further developed German language skills.

Bar Exam Tutor. Tutor for New York Bar Exam for private clients and a company called LLM Bar Exam.

Forrest Solutions, New York, NY. *Paralegal*. September 2015 – October 2015. Extracted critical data from over one hundred employment contracts, helped build an online database.

Community Service Society. New York, NY. *Volunteer, legal team*. August – September 2015. Challenged denials of coverage by medical insurance companies. Drafted memo and external appeal.

California Court of Appeal. Los Angeles, CA. *Extern*. January – May 2015. Worked as legal extern under a research attorney for Justice Jeffrey Johnson. Researched appellate procedural law, demurrer pleading.

Barristers' Chambers. London. *Mini-pupil*. December 2012 – August 2013. Undertook ten short internships at top commercial and chancery barristers' chambers in London.

University of Southampton School of Law. Southampton, UK. *Research Assistant*. Summer 2011. Research assistant to Dr Özlem Gürses researching insurance and reinsurance law.

ESL Schools in South Korea, China, Ukraine, Germany. *English Teacher*. 2007 – 2010. Taught English to students ranging from children to business people. Developed learning materials. Traveled extensively in over 45 countries on four continents.

LANGUAGES:

German. Fluent, academic writing proficiency.

Spanish. Upper intermediate, actively learning.



University of Southampton Diploma Supplement

Section 1 Information identifying the Holder of the Qualification

Student Name Ross Martin
Date of Birth 8 August 1980
Student ID 24262544
HESA ID 1011602625448

Section 2 Information identifying the Qualification

Qualification Achieved

Bachelor of Laws Law

Classification

with First Class Honours

Date Awarded

22 June 2012

Date of Admission

30 September 2010

Date of Leaving

22 June 2012

Awarding Institution

University of Southampton

Teaching Campus

Southampton campuses

Language of Instruction

English

Section 3 Information on the Level of Qualification

Programme Level

Undergraduate

Length of Programme

21 Months

Mode of Study

Full Time

Section 4 Programme Outcomes and Results Gained

2010/11		Level	UK Credits	ECTS	Code	Mark
LAWS1012	Legal System and Reasoning	NQF4	30	15	OE	63
LAWS1013	Constitutional & Admin. Law	NQF4	30	15	OE	70
LAWS1014	Criminal Law	NQF4	30	15	OE	71
LAWS1015	Law of Contract	NQF4	30	15	OE	73

Continued...

Bald Nutbeam
 Vice-Chancellor



T. J. Hammar
 Registrar

This document is not proof of an Award.
 It should be read in conjunction with the explanatory notes overleaf.

Understanding this document

This Diploma Supplement was developed by the European Commission, Council of Europe and UNESCO/CEPES. The purpose of the supplement is to provide sufficient data to improve the international transparency and fair academic and professional recognition of qualifications (diplomas, degrees, certificates etc.). It is designed to provide a description of the nature, level, context, content and status of the studies that were pursued and successfully completed by the individual named on the original qualification to which this supplement is appended. It is free from any value judgements, equivalence statements or suggestions about recognition.

The information given overleaf is provided by the University*, under the terms of the Data Protection Act 1998, from its student administration system as the academic and identifying personal information recorded for the student named. It is issued with an explanatory document, 'The University of Southampton Explanatory Notes on the Diploma Supplement"', and, when read together, it constitutes a full Diploma Supplement.

The Diploma Supplement is divided into the following eight sections: section one, information identifying the holder of the qualification; section two, information identifying the qualification; section three, information on the level of the qualification; section four, information on the content of the qualification and the results gained; section five, information on the function of the qualification; section six, additional information; section seven, certification of the Diploma Supplement and section eight, a summary and description of the UK Higher Education and Training System. Sections on this document are numbered appropriately to correspond with this convention. Sections six and eight, and aspects of sections three, four and five, are continued in the explanatory document.

The University issues its full Diploma Supplement solely to students who completed the requirements for the award of one of its degrees or other qualifications in or after the academic year 2008-09***. The transcript information alone is provided to students who completed studies before 2008 or who have undertaken studies which did not lead to the award of a degree or other qualification by the University.

A transcript is an authoritative and official record of a learner's programme of study to date, the grades they have achieved and the credit they have gained. Neither the Diploma Supplement nor the transcript is proof of an Award from the University.

The University's programmes of study leading to the award of a named degree or other qualification comprise the study of modules. A module is a self-contained unit of teaching, learning and assessment. Each module has a credit weighting based upon the proportion of time that students are expected to devote to the module. The University uses a credit point system compatible with the QAA Higher Education Credit Framework for England: Guidance on Academic Credit Arrangements in Higher Education in England, August 2008. The European Credit Transfer Scheme (ECTS) has been developed by the European Commission. This is a system based on ECTS credits (student workload), designed to facilitate mobility, credit accumulation and transfer and the international recognition of periods of study completed abroad. Occasionally students may accumulate credits at other institutions. This University will represent the marks achieved for those credits on this document. The modules taken outside of the University can be clearly identified by the last 3 digits of the module (e.g. BIOL1999). The language competency levels used by the University are informed by the Council of Europe's Common Framework of Reference. Modules are assigned levels, represented on this document with the following values and meanings:

0/NQF3 Level 3 (Foundation level)	6/NQF7 Level 7 (Master)
1/NQF4 Level 4 (Certificate of Higher Education level)	7/NQF7 Level 7 (Master of Philosophy)
2/NQF5 Level 5 (Diploma of Higher Education level)	8/NQF8 Level 8 (Doctorate)
3/NQF6 Level 6 (Bachelor including Advanced Diploma in Nursing)	L1-L7 Language competency levels 1-7

The modules and credits studied in each programme year are set out in the individual programme specification as published.

All the module outcomes obtained by a student are represented on this document. The module outcome is represented by a mark. Numerical marks are shown in the University's 0-100 scale. Non numerical marks are shown on a scale of A, B, C, D, E, F. The letter P denotes a Pass and the letter F denotes a Fail, where the module is being marked on a pass/fail basis. Where P is used as postscript to a numerical mark it denotes that the module has been passed, even though the mark appears to be below the module pass mark. Where F is used as postscript to a numerical mark it denotes that the module has been failed, even though the mark appears to be above the module pass mark. The notation 'AU' indicates that the module was audited: this means that the student attended the teaching, but assessment was not taken for any credit. The notation 'AUAB' indicates authorised absence from the assessment of the module. Each mark printed on this document is accompanied by relevant mark code. The code denotes as follows:

OE – Original Entry;	recording the student's original achievement in the first attempt at the module assessment
RE – Referral;	recording the student's achievement in the referral sitting of a module when the original achievement was not a pass
CR – Capped mark;	recording the level at which the student's mark was capped following referral, according to the regulations used for progression and in the classification of Award
OM – Original Mark;	recording the student's achievement when taking a referral as if for the first time according to the regulations used in progression and in the classification of Award

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* or one of its accredited colleges or affiliated institutions

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*** it is issued to BM students who complete in or after the academic year 2011-12

University of Southampton

Diploma Supplement



Student Name Ross Martin
Student ID 24262544

HESA ID 1011602625448

Section 4 Programme Outcomes and Results Gained

2011/12		Level	UK Credits	ECTS	Code	Mark
LAWS2019	Law of Torts	NQF5	30	15	OE	AU
LAWS3052	Legal Research and Writing	NQF6	30	15	OE	68
LAWS3075	Equity and Trusts	NQF6	30	15	OE	68
LAWS3076	European Union Law	NQF6	30	15	OE	75
LAWS3077	Land Law	NQF6	30	15	OE	70
LAWS3078	Law of Torts	NQF6	30	15	OE	72

Results List Ends

Section 5 Information on the function of the Qualification

No Professional Registration statement recorded.

Date Printed | 10 July 2012

Bald Nutbeam
 Vice-Chancellor



T. J. Hammar
 Registrar

This document is not proof of an Award.
 It should be read in conjunction with the explanatory notes overleaf.

Understanding this document

This Diploma Supplement was developed by the European Commission, Council of Europe and UNESCO/CEPES. The purpose of the supplement is to provide sufficient data to improve the international transparency and fair academic and professional recognition of qualifications (diplomas, degrees, certificates etc.). It is designed to provide a description of the nature, level, context, content and status of the studies that were pursued and successfully completed by the individual named on the original qualification to which this supplement is appended. It is free from any value judgements, equivalence statements or suggestions about recognition.

The information given overleaf is provided by the University[#], under the terms of the Data Protection Act 1998, from its student administration system as the academic and identifying personal information recorded for the student named. It is issued with an explanatory document, 'The University of Southampton Explanatory Notes on the Diploma Supplement'^{##}, and, when read together, it constitutes a full Diploma Supplement.

The Diploma Supplement is divided into the following eight sections: section one, information identifying the holder of the qualification; section two, information identifying the qualification; section three, information on the level of the qualification; section four, information on the content of the qualification and the results gained; section five, information on the function of the qualification; section six, additional information; section seven, certification of the Diploma Supplement and section eight, a summary and description of the UK Higher Education and Training System. Sections on this document are numbered appropriately to correspond with this convention. Sections six and eight, and aspects of sections three, four and five, are continued in the explanatory document.

The University issues its full Diploma Supplement solely to students who completed the requirements for the award of one of its degrees or other qualifications in or after the academic year 2008-09^{###}. The transcript information alone is provided to students who completed studies before 2008 or who have undertaken studies which did not lead to the award of a degree or other qualification by the University.

A transcript is an authoritative and official record of a learner's programme of study to date, the grades they have achieved and the credit they have gained. Neither the Diploma Supplement nor the transcript is proof of an Award from the University.

The University's programmes of study leading to the award of a named degree or other qualification comprise the study of modules. A module is a self-contained unit of teaching, learning and assessment. Each module has a credit weighting based upon the proportion of time that students are expected to devote to the module. The University uses a credit point system compatible with the QAA Higher Education Credit Framework for England: Guidance on Academic Credit Arrangements in Higher Education in England, August 2008. The European Credit Transfer Scheme (ECTS) has been developed by the European Commission. This is a system based on ECTS credits (student workload), designed to facilitate mobility, credit accumulation and transfer and the international recognition of periods of study completed abroad. Occasionally students may accumulate credits at other institutions. This University will represent the marks achieved for those credits on this document. The modules taken outside of the University can be clearly identified by the last 3 digits of the module (e.g. BIOL1999). The language competency levels used by the University are informed by the Council of Europe's Common Framework of Reference. Modules are assigned levels, represented on this document with the following values and meanings:

0/NQF3 Level 3 (Foundation level)	6/NQF7 Level 7 (Master)
1/NQF4 Level 4 (Certificate of Higher Education level)	7/NQF7 Level 7 (Master of Philosophy)
2/NQF5 Level 5 (Diploma of Higher Education level)	8/NQF8 Level 8 (Doctorate)
3/NQF6 Level 6 (Bachelor including Advanced Diploma in Nursing)	L1-L7 Language competency levels 1-7

The modules and credits studied in each programme year are set out in the individual programme specification as published.

All the module outcomes obtained by a student are represented on this document. The module outcome is represented by a mark. Numerical marks are shown in the University's 0-100 scale. Non numerical marks are shown on a scale of A, B, C, D, E, F. The letter P denotes a Pass and the letter F denotes a Fail, where the module is being marked on a pass/fail basis. Where P is used as postscript to a numerical mark it denotes that the module has been passed, even though the mark appears to be below the module pass mark. Where F is used as postscript to a numerical mark it denotes that the module has been failed, even though the mark appears to be above the module pass mark. The notation 'AU' indicates that the module was audited: this means that the student attended the teaching, but assessment was not taken for any credit. The notation 'AUAB' indicates authorised absence from the assessment of the module. Each mark printed on this document is accompanied by relevant mark code. The code denotes as follows:

OE – Original Entry;	recording the student's original achievement in the first attempt at the module assessment
RE – Referral;	recording the student's achievement in the referral sitting of a module when the original achievement was not a pass
CR – Capped mark;	recording the level at which the student's mark was capped following referral, according to the regulations used for progression and in the classification of Award
OM – Original Mark;	recording the student's achievement when taking a referral as if for the first time according to the regulations used in progression and in the classification of Award

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^{###} it is issued to BM students who complete in or after the academic year 2011-12

**ACADEMIC TRANSCRIPT****Personal Information**

Student: Ross W MARTIN
 University Reference: 631330
 Qualification Sought: Bachelor of Civil Law
 Start Date: 09 October 2012

Date of Birth: 08 August 1980
 HESA Reference: 1211560632067
 FHEQ Level: Masters
 End Date: 17 July 2014

Programme Information

Teaching Institution: University of Oxford
 College: University College
 Programme of Study: Bachelor of Civil Law

Awarding Institution: University of Oxford
 Mode of Attendance: Full Time
 Language of Instruction: English

Award Information

Qualification Awarded: Bachelor of Civil Law
 Classification: Pass
 Date of Award: 17 July 2014

Assessment Information**Academic**

Year	Assessment Name	Result Mark/Grade	Attempt Number
2013/14	Commercial Remedies	50	2
2013/14	Competition Law	67	2
2013/14	Corporate and Business Taxation	56	2
2013/14	Restitution of Unjust Enrichment	44	2

Pass: For the award of the degree of BCL or MJur there must be no mark lower than 50. A mark lower than 50 but greater than 40 may be compensated by very good performance elsewhere, but a mark of 40 or below is not susceptible of compensation. Distinction: For the award of a Distinction in BCL or MJur a candidate must secure marks of 70 or above on two or more papers (The optional dissertation counts as one paper for these purposes). In addition, there must be no other mark lower than 60. It is important to appreciate that these conventions are not inflexible rules. The examiners have a residual discretion to deal with unusual cases and circumstances.

End of Transcript

Transcript printed on 17 July 2014

Page 1 of 1

Eva G. McKechnie

Registrar

Student Copy / Personal Use Only | [204537794] [MARTIN, ROSS]

University of California, Los Angeles

LAW Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: MARTIN, ROSS W
 UCLA ID: 204537794
 Date of Birth: 08/08/XXXX
 Version: 08/2014 | SAITONE
 Generation Date: June 22, 2021 | 02:19:08 PM
 This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/13/2014
 SCHOOL OF LAW
 Major:
 LAW-LLM
 Specializing in BUSINESS LAW - BUSINESS LAW TRACK

Degrees | Certificates Awarded

MASTER OF LAWS Awarded May 15, 2015
 in LAW-LLM
 With a Specialization in BUSINESS LAW - BUSINESS LAW TRACK

Previous Degrees

None Reported

Fall Semester 2014

Major: LAW-LLM					
INTRO FED INCOME TX	LAW 220	4.0	13.2	B+	
REMEDIES	LAW 300	4.0	16.0	A	
PROFESSIONAL RESPON	LAW 312	2.0	7.4	A-	
CONTRACTS - LLM	LAW 403	2.0	8.0	A	
AMER LW/GLOBAL CNTX	LAW 570	2.0	0.0	P	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		14.0	14.0	44.6	3.717

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Spring Semester 2015

BUSINESS ASSOCIATNS	LAW 230	4.0	0.0	P	
SECURED TRANSACTNS	LAW 250	3.0	8.1	B-	
LLM LEGAL RESEARCH	LAW 406	2.0	0.0	P	
STATE APPELLATE	LAW 781	4.0	0.0	P	
NEGOTIATION THEORY	LAW 972	3.0	9.0	B	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		16.0	16.0	17.1	2.850

LAW Totals

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Pass/Unsatisfactory Total	12.0	12.0	N/a	N/a
Graded Total	18.0	18.0	N/a	N/a
Cumulative Total	30.0	30.0	61.7	3.428
Total Completed Units	30.0			

END OF RECORD
NO ENTRIES BELOW THIS LINE



CANTERBURY LAW LIMITED
BARRISTERS & ATTORNEYS
THIRD FLOOR, SWAN BUILDING
26 VICTORIA STREET, HAMILTON HM 12
BERMUDA
TELEPHONE: +1 (441) 296-8444
WEBSITE: WWW.CANTERBURYLAW.BM

MAIL:
PO Box HM 2439
HAMILTON HM JX
BERMUDA
EMAIL: MAIL@CANTERBURYLAW.BM

March 8, 2023

To whom it may concern:

I am Bermudian by birth and am a Director of the law firm, Canterbury Law Limited, a civil and commercial law firm in Bermuda where I practice employment law and related commercial dispute resolution. I have been practicing law in Bermuda for 27 years and I am a Rhodes Scholar. I am writing this letter to enthusiastically recommend Mr. Ross W. Martin.

Ross worked for me remotely from July 2020 to July 2021 as a consulting/contract attorney, assisting me on multiple matters, most notably a large employment arbitration pertaining to the work of an insurance company headquartered in Bermuda. Ross reached out to me in early 2020, and I was immediately impressed not only by his qualifications but also by his entrepreneurial nature and willingness to seek me out. We worked out an arrangement whereby he worked for me remotely, checking in with me on a daily basis.

In our large arbitration, Ross was tasked with drafting the witness statement for the CEO of this insurance company and contributing substantively to legal submissions. Ross was readily able to win the confidence of the CEO with his professional demeanour and willingness to learn the business of insurance and learn how decisions are made on both qualitative and quantitative levels. The lengthy and detailed witness statement he drafted was of exceptional quality.

His contributions to our submissions were excellent, and demonstrated considerable research skills and genuine understanding of the relevant legal issues. Legal research in Bermuda is not easy; although the law of Bermuda and the Caribbean is based on common law principles, databases are poorly organized and significant effort is required to identify authority applicable to a case. Ross was readily able to adapt to this practice.

Finally, I was impressed with Ross's teamwork skills. He worked relatively autonomously, but made sure I was aware of the work he was undertaking and how he was progressing. In his daily debriefing emails to which he attached his work product, he was able to describe what he had accomplished, candidly explain its strengths and weaknesses, and identify where he needed guidance and supervision without ever having me feel burdened. He is personable and friendly, and was a pleasure to work with.

Ross has proven to be a dependable lawyer with a passion for his work. Should you wish to inquire further about his qualifications, please feel free to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Juliana Marie Snelling'.

Juliana Marie Snelling
+1 (441) 505-6131
jnelling@canterburylaw.bm

**IN THE MATTER OF AN AD HOC ARBITRATION UNDER THE
UNCITRAL RULES 2013, AS AMENDED**

Between:

Tarens Construction Ltd

Claimant

and

Pryontics Ltd

Respondent

FINAL AWARD

Claimant's Representatives:

Advocate Chloe Burns

Respondent's Representatives:

Advocate Abdullah Rahmanovich

Arbitrator:

Dr Dara Nagambi

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INTRODUCTION AND BACKGROUND TO THE CLAIM

1. The Claimant party, Tarens Construction Ltd, Registered Number N3327876, with registered office at The Yard, Northampton, Northistan, 88354, is a company incorporated under the laws of Northistan. It describes itself as a family-run construction firm and has the role of contractor in the Northistan electricity substation project (the “Project”).
2. The Respondent party, Pryontics Ltd, Northistan, Registered Number SL23332, with registered office at Hertha Ayrton Towers, Southsea, Southland, 25345, is a company incorporated under the laws of Southland. It has the role of employer in the Project.
3. These parties (the “Parties”) are in dispute. The uncontroversial background to their dispute is as follows. The Parties are commercial actors represented by counsel, and it is appropriate that uncontested facts be taken as admitted.¹
 - 3.1. The Parties entered into a contract (the “Contract”) on 1 July 2020 under the laws of Northistan to build an electricity substation in Northistan. The contract was formally titled “Build Contract NISTN/40034/22”. The Contract included terms for the payment of an Advance Payment of N\$2,000,000 “*as an interest-free loan for mobilisation*” and the payment of 48 monthly interim payment certificates of N\$500,000 on or before the 28th of each calendar month on submission of duly certified IPCs before the 23rd day of that month. The Contract included terms for Determinations by the Engineer; variations by the Engineer and the Contractor; procedures for approval of variations; the Contractor’s entitlement to suspend work; and termination by the contractor.
 - 3.2. The Respondent paid an advance of N\$2,000,000 to the Claimant upon the execution of the Contract by the Parties on 1 July 2020. Mobilisation took place between 1 July 2020 and 31 July 2020, and work started on 1 August 2020.
 - 3.3. The Respondent provided design work to the Claimant at the beginning of the Contract.
 - 3.4. The Respondent at some point thereafter modified the contract in such a way as to render the design impossible to execute in regards to Tank Room No. 8.
 - 3.5. The Claimant notified the Engineer on 5 October 2020 of what it believed were problems with machinery fitting in Tank Room No. 8.
 - 3.6. On 8 October 2020, the Claimant submitted a Value Engineering Variation request to the Engineer.
 - 3.7. On 10 October 2020, the Engineer replied to the Claimant, saying that the Claimant was not responsible for design work and had to build as designed.

¹ *Harris International Communications v Islamic Republic of Iran*, Award No. 323-409-1 (November 2, 1987), reprinted in Iran-US CTR 31, 47 (1987-IV)

- 3.8. On 1 November 2020, the Claimant gave instructions to its team to proceed with changes to Tank Room No. 8.
- 3.9. On 3 November 2020, the Claimant wrote to the Respondent to explain its perspective on what had gone wrong, and to request N\$1,000,000 for what it claimed was reimbursement for its costs.
- 3.10. At some point soon after 3 November 2020, the Respondent replied to the Claimant, stating that the changes were unsolicited, and refusing payment or Variation order.
- 3.11. On 28 January 2021, the Respondent failed to pay IPC No. 5, and subsequently failed to pay IPCs Nos. 6, 7 and 8 as they became payable.
- 3.12. On 25 February 2021, the Claimant gave notice to terminate the Contract.
- 3.13. On 1 May 2021, the Claimant terminated the contract.
- 3.14. On 7 June 2021, the Claimant made an offer to the Respondent to settle the dispute for N\$3,000,000. The Respondent refused this offer, and threatened to cash the letter of credit.
- 3.15. 15 June 2021, the Respondent made a without prejudice settlement offer to settle the matter with the Claimant for N\$1,000,000. On 16 June 2021, the Claimant rejected this letter.
- 3.16. On 20 June 2021, the Respondent made another settlement offer for N\$1,500,000. On 1 July 2021, the Claimant rejected this offer.
- 3.17. On 1 July 2020, the Claimant filed a Notice of Arbitration in which the name of the Respondent was written as “Pyrontics Ltd, Northistan” three times: in the carbon-copy recipient list; in the body of the email; and in the table of contact details for the Parties. This was accompanied by an apparent misspelling of the name of the CEO of the Respondent; in the email this individual was identified as “Marco Pyro”, whereas in subsequent correspondence, this individual was identified as “Marco Pryon”.
4. I shall set out the relevant operative provisions of the Contract below, as and when they become material. For present purposes it suffices to note Sub-Clause 21.2 of the Contract (the “Arbitration Clause”), contains an agreement to submit all disputes arising out of or connection with the Contract to arbitration. The Arbitration Clause in full provides:

21.1 If the Parties agree to constitute a Dispute Board, and the Dispute Board fails to render a decision within 100 days of the constitution of the Dispute Board, either Party may initiate arbitration.

21.2 Provided that no Dispute Board has been constituted, or that the Dispute Board has failed to render its decision within 100 days of constitution, all disputes arising out of or in connection with this Contract shall be finally resolved by

binding arbitration on an ad hoc basis between the parties to this Contract, in Easthead under UNCITRAL Arbitration Rules. A sole arbitrator will be appointed by the Easthead Arbitration Institute, (EAI), in its capacity as appointing authority. The language of arbitration shall be English.

5. In short summary, the Claimant alleges that:
 - 5.1. the Respondent is liable for the cost of the variation works it made to Tank Room No. 8, for a cost of N\$1,000,000, due to the Engineer's failure to deal with the matter; and
 - 5.2. the Respondent owes N\$500,000 on IPCs Nos. 5, 6, 7, and 8, for a total of N\$2,000,000, due to the Respondent's failure to pay on these IPCs as they allegedly came due.
6. The Respondent disputes the allegation, arguing that:
 - 6.1. the works done by the Claimant to Tank Room No. 8 were unsolicited, and thus that no monies are due for those works.
 - 6.2. the Advance of N\$2,00,000 covers the 4 unpaid IPCs.
7. The Parties, are, however, in agreement that:
 - 7.1. the Arbitration Clause as written above is correct and applies to the dispute that has arisen between them;
 - 7.2. the seat of arbitration is Easthead;
 - 7.3. the Easthead Arbitration Institute (EAI) shall be the appointing authority, by virtue of Sub-Clause 21.2 of the Contract;
 - 7.4. the language of the arbitration shall be English, by virtue of Sub-Clause 21.2 of the Contract;
 - 7.5. the UNCITRAL Arbitration Rules, 2013, as amended, apply by virtue of the Arbitration Agreement
 - 7.6. the IBA Rules of Evidence 2020 apply by consent.

PROCEDURAL HISTORY

8. As noted above, the Claimant began the arbitration process by filing, via its representative, a Notice of Arbitration with the Easthead Arbitration Institute in its capacity as appointing authority and the Respondent on 1 July 2021.
9. The EAI contacted me via email on 5 July 2021 to propose to nominate me for the position of arbitrator in its capacity as appointing authority under Sub-Clause 21.2. They attached their form, "Conflict Check and Availability Form Arb," and requested that I return it via email.

10. I considered whether there might be any conflicts of interest or any other reason why I should not accept the appointment. Having concluded there were no such reasons, I wrote back to the EAI on 6 July 2021 to accept the nomination and to confirm that I considered myself suitably qualified. In this communication, I noted that I had been unable to find “Pyrontics Ltd” on the Southland Companies Register, but that I had found “Pryontics” at the same address. I stated that I assumed this had been a typographical error.
11. The EAI wrote back to me on 12 July 2021 to confirm that it had received my documents. The EAI stated that it would write to the Parties on 15 July 2021 to officially notify the Parties of my notification; the EAI stated that this would constitute my appointment date. The EAI thanked me for pointing out the error in the Respondent’s Company name and stated that the EAI had corrected it in the EAI’s records.
12. The EAI wrote to the Parties and to me on 15 July 2021, stating that it acknowledged the Claimant had commenced arbitration against the Respondent, identified as Pryontics Ltd, and attaching the Notice of Arbitration email. The EAI further stated that it had named me as arbitrator in this arbitration, pursuant to Sub-Clause 21.2 of the Contract.
13. Later that day, I emailed the parties and the EAI to acknowledge the EAI’s email and my appointment as sole arbitrator in the present dispute. I proposed a Procedural (or, preliminary) Meeting for 25 July 2021, to be held virtually at 2 PM. I attached my terms of appointment, which I requested the Parties sign and return to in advance of the Preliminary Meeting; I noted the requirement of an advance on my fee, which was required to be paid equally by each party in advance of the Preliminary Meeting.
14. Following this email on 15 July 2021, the CEO of the Respondent, Marco Pryon, emailed me, counsel for the Claimant, and the registrar for EAI stating the arbitral tribunal had not been properly constituted due to the jurisdictional challenges the Respondent later brought.
15. In response to this email, on 15 July 2021, I replied to the CEO of the Respondent, stating that, as I had been appointed as an arbitrator, I would deal with this under my authority as given in the rules and law, while giving the Respondent ample opportunity to state any objections to my jurisdiction.
16. The Preliminary Meeting was duly held on 25 July 2021.
17. At the Preliminary meeting, counsel for the Parties confirmed that the Arbitration Clause within the Contract was as communicated to me by the EAI and sent an agreed copy of the Contract. The Parties confirmed that the seat of arbitration is Easthead. The Parties agreed that the substantive law of the Contract was that of Northistan and agreed that both the Contract and the Arbitration Agreement were valid. At my request, the Parties also agreed that the IBA Rules of Evidence would be accepted as binding in this arbitration.
18. The Parties also agreed:
 - 18.1. A costs cap on party costs of E£500,000 per party total would apply;

- 18.2. Costs of and occasioned by the preliminary meeting were to be costs in the arbitration
 - 18.3. All communications to me by either party shall be copied to the other party and marked to that effect.
 - 18.4. The currency of the Award was to be Easthead Pounds (E£)
 - 18.5. Exchange rate was to be fixed at 1 N\$ = 1.5 E£.
 - 18.6. Both Parties would be allowed to appoint expert witnesses.
19. The Parties agreed on this timetable:
- | | |
|-------------|--|
| 01.10.21 | Statement of Claim |
| 01.11.21 | Statement of Response and Counterclaim |
| 01.12.21 | Statement of Response to Counterclaim |
| 06.01.22 | Cut-off date for evidence |
| 08.01.22 | Claimant to submit an agreed core bundle of documents for the hearing. |
| 10-13.01.22 | Hearing and Witness statements |
20. At this the Preliminary Hearing, the Respondent raised jurisdictional challenges regarding the name with which it was identified in the Notice of Arbitration and the effect of provisions in the Arbitration Clause allegedly requiring escalation.
21. On 25 July 2021, after the Preliminary Hearing, I issued “Order for Directions No. 1” reflecting the agreed matters.
22. Specifically, Order for Directions No. 1, dated 25 July 2021, set out:
- 22.1. Parties agree that the substantial law applicable to the merits of the dispute are the laws of Northistan;
 - 22.2. Parties agree that the seat of arbitration is Easthead;
 - 22.3. Parties agree that UNCITRAL Rules 2013, as amended, apply by virtue of Sub-Clause 21.2
 - 22.4. Parties agree that the IBA Rules on the Taking of Evidence in International Arbitration, 2020, shall apply to this dispute.
 - 22.5. All communications, statements, and evidence to be submitted to the other Party and to the Arbitrator via email to these addresses: dara@ngambilaw.co.ea, Chloe Burns of 5th Chambers Northampton, and Abdullah Rahmanovich of Rahman Law Southsea.

- 22.6. Claimant to submit its Statement of Claim on or before 01.10.21.
 - 22.7. Respondent to submit their Reply to Statement of Claim and Defence on or before 01.11.21.
 - 22.8. Claimant to submit Statement of Response to Counterclaim by 01.12.21.
 - 22.9. Cut-off date for submission of evidence set as 06.01.22
 - 22.10. Written witness statements due 10 January 2022.
 - 22.11. Hearing and oral testimony of witnesses to take place from 10 January 2022 to 13 January 2022.
23. Prior to the Hearing, the Parties were to pay an advance on my fee, to be paid equally by each party in advance of the Preliminary Meeting.
24. The Pre-Hearing meeting was held on 8 January 2022, where arrangements to have summing up rather than closing statements, and for closing statements be given in the form of Post Hearing briefs along with costs sheets. An agreement was made on the structure of the hearing.
25. In accordance with the Order for Directions No. 1, a hearing was held on 11 January 2022, 12 January 2022, and 13 January 2022. The Claimant was represented by Chloe Burns as counsel and Jacob Tarens as company representative. The Respondent was represented by Abdullah Rahmanovich as counsel and Marco Pryon as company representative. The hearing was completed within the four allocated days and I thank the parties and their representatives for the efficacy with which the hearing was conducted.
26. I shall deal with the evidence given before me below, but I shall here record the evidence received at the hearing:
- 26.1. The Claimant called the following witnesses, who attended for cross-examination upon their statements and expert reports respectively, exchanged in accordance with Procedural Order No. 1:
 - 26.1.1. Jacob Tarens, Managing Director
 - 26.1.2. Mary Bell, Secretary to Jacob Tarens
 - 26.1.3. Evan Llywd, expert in delay damages and commercial financing
 - 26.2. The Respondent called the following witnesses, who attended for cross-examination upon their statements and expert reports respectively, exchanged in accordance with Procedural Order No. 1:
 - 26.2.1. Marco Pryon, CEO
 - 26.2.2. Lesley Randal, Engineer

26.2.3. Jackie Jones, an expert in FIDIC type contracts.

27. As directed, the Parties had also lodged a bundle of agreed documents in advance of the hearing, which I had read prior thereto.
28. At the end of the hearing, I asked the parties and their representatives if they were content that they had been heard on all the issues in dispute and had made such submissions as they wished to make. This was confirmed and I declared the hearing closed UNCITRAL Rules Article 31.
29. Subsequent to the Hearing, Post Hearing Briefs (PBHs) were exchanged simultaneously on 12 February 2022, as agreed.
30. Detailed and itemized cost submissions were also submitted simultaneously on 12 February 2022, together with details of the settlement offers made between the Parties.
31. I then rendered this Award on 14 June 2022, terminating the arbitration proceedings according to the UNCITRAL Model Law. I ordered a 14-day grace period for payment of the Award by the unsuccessful Party, after which non-compliance interest will run as Awarded in the operative part of this Award.

THE BACKGROUND TO THE DISPUTE

32. I can now set out the facts in more detail. Where there are disputed facts, I shall indicate the Parties' respective positions. I shall then make the findings necessary to resolve the issues below.
33. The uncontroversial background to their dispute is as follows:
 - 33.1. The Parties entered into a contract (the "Contract") on 1 July 2020 under the laws of Northistan to build an electricity substation in Northistan. The contract was formally titled "Build Contract NISTN/40034/22". The Contract included terms for: the payment of an Advance Payment of N\$2,000,000; the payment of 48 monthly interim payment certificates of N\$500,000; the provision of design work by the Respondent; the construction of certain works by the Claimant; provisions concerning determinations, variations, the Contractor's entitlement to suspend work, and the Contractor's entitlement to terminate.
 - 33.2. The Respondent paid an advance of N\$2,000,000 to the Claimant upon the execution of the contract by the Parties on 1 July 2020. Mobilisation took place between 1 July 2020 and 31 July 2020, and work started on 1 August 2020.
 - 33.3. The Respondent provided design work to the Claimant. These designs were soon changed in ways that affected Tank Room No. 8.
 - 33.4. The Claimant notified the Engineer on 5 October 2020 of what it believed were problems with machinery fitting in Tank Room No. 8.

- 33.5. On 8 October 2020, the Claimant submitted a Value Engineering Variation request to the Engineer.
- 33.6. On 10 October 2020, the Engineer replied to the Claimant, saying that the Claimant was not responsible for design work and had to build as designed.
- 33.7. On 1 November 2020, the Claimant gave instructions to its team to proceed with changes to Tank Room No. 8.
- 33.8. On 3 November 2020, the Claimant wrote to the Respondent to explain its perspective on what had gone wrong, and to request N\$1,000,000 for what it claimed was reimbursement for its costs.
- 33.9. At some point soon after 3 November 2020, the Respondent relied to the Claimant, stating that the changes were unsolicited, and refusing payment or Variation order.
- 33.10. The Engineer refused to certify the Value Engineering Valuation at any time.
- 33.11. Starting on 23 January 2021, and for three further months on the 23rd, the Engineer certified IPCs submitted by the Claimant.
- 33.12. On or about 28 January 2021, the Respondent failed to pay IPC No. 5, and subsequently failed to pay IPCs Nos. 6, 7 and 8.
- 33.13. On 25 February 2021, the Claimant gave notice to terminate the Contract.
- 33.14. On 1 May 2021, the Claimant terminated the contract.
- 33.15. On 7 June 2021, the Claimant made an offer to the Respondent to settle the dispute for N\$3,000,000. The Respondent refused this offer, and threatened to cash the letter of credit.
- 33.16. 15 June 2021, the Respondent made a without prejudice settlement offer to settle the matter with the Claimant for N\$1,000,000. On 16 June 2021, the Claimant rejected this letter.
- 33.17. On 20 June 2021, the Respondent made another settlement offer for N\$1,500,000. On 1 July 2021, the Claimant rejected this offer.
- 33.18. On 1 July 2020, the Claimant filed a Notice of Arbitration in which the name of the Respondent was written as “Pyrontics Ltd, Northistan” three times, in the carbon-copy recipient list; in the body of the email; and in the table of contact details for the Parties. This was accompanied by an apparent misspelling of the name of the CEO of the Respondent; in the email this individual was identified as “Marco Pyro”, whereas in subsequent correspondence, this individual was identified as “Marco Pryon”.

- 33.19. As identified at the hearing, machinery would have to pass thorough the mezzanine and stairs and it would be impossible to fit it into the Employer's design.

THE CLAIMS

34. The Claimant seeks the following remedies:

- 34.1. A declaration that IPCs 5-8 were duly certified and are payable.
- 34.2. A total of N\$2,000,000 for the four unpaid IPCs
- 34.3. Interest on each IPC from the relevant due date for payment until the date the award is paid.
- 34.4. N\$ 1,000,000 for the costs of the changes made to Tank Room No. 8.
- 34.5. All costs in the dispute.
- 34.6. Any other damages the Tribunal sees fit.

35. The Respondent denies that the Claimant is entitled to the relief claim and seeks the following remedies:

- 35.1. A declaration that the works to Tank Room No. 8 were unsolicited and that no monies are due for these works.
- 35.2. A declaration that the Advance of N\$ 2,000,000 covers the four unpaid IPCs.
- 35.3. A declaration of no amounts to pay.

36. It is unclear whether the Respondent seeks costs. In a section prior to the section "Prayer for Relief", the Respondent writes, "All claims of the Claimant should be denied and all costs incurred by the Respondent in proceedings should be reimbursed to the Respondent." As written, this does not formally seek costs.

THE ISSUES BETWEEN THE PARTIES

37. The Parties agree on the uncontroversial facts enumerated and described above.

38. However, the Parties are not in agreement on the following facts:

- 38.1. Whether the Arbitrator has jurisdiction to hear the matter despite apparent flaws in the appointment process.
- 38.2. Whether the Respondent had the right to withhold payment on the IPCs due to the Claimant's purported breach of contract in undertaking works on Tank Room No. 8.

- 38.3. Whether it was necessary that works on Tank Room No. 8 needed to be accomplished in October and November 2020, or whether the Claimant had made changes to the work schedule.
- 38.4. Whether the Engineer responded to the Claimant's 5 October 2020 enquiry, and if so, how.
- 38.5. Whether the Claimant had given the Employer and Engineer sufficient time to investigate and do a cost analysis in regards to Tank Room No. 8.
- 38.6. Whether the Engineer paid enough heed to the Claimant's warnings to fulfil its obligations under Sub-Clause 4.4.
- 38.7. Whether the Advance Payment was consumed by Contractual works benefitting the Respondent or whether the Claimant purchased and appropriated to itself machinery (claimed to be worth N\$735,764).
39. As such, the issues between the Parties which fall to me to determine are as follows:
- 39.1. Whether the Tribunal has jurisdiction to hear the present matter despite the error in the name of the Respondent in the Notice of Arbitration.
- 39.2. Whether the Tribunal has jurisdiction to hear the present matter despite the Respondent's allegation that the Arbitration Clause requires that a Dispute Adjudication Board be constituted.
- 39.3. Whether IPCs are due and payable, and if so, whether the Advance Payment is capable according to the terms of the contract of being used to cover such IPCs.
- 39.4. Whether the Claimant's works regarding Tank Room No. 8 were properly undertaken, and if so, whether and to what extent they were compensable.

**PRELIMINARY DETERMINATION OF THE LAW GOVERNING THE
ARBITRATION AGREEMENT AND ARBITRATION PROCEDURE**

40. I must address what law it is that governs the arbitration agreement and thus the arbitration procedure, as the Parties have not made this clear. Per discussions held at the Preliminary Meeting on 25 July 2021, the parties agreed that there was not conflict as to the validity of the Contract or the Arbitration Agreement.
41. The Arbitration Clause provides, "*...all disputes arising out of or in connection with this Contract shall be finally resolved by binding arbitration on an ad hoc basis between the parties to this Contract, in Easthead under UNCITRAL Rules. A sole arbitrator will be appointed by the Easthead Arbitration Institute.*" It was confirmed at the Preliminary meeting held 25 July 2021 that the seat of arbitration was Easthead and that the substantive law of the contract was that of Northistan.

42. It is trite law that the UNCITRAL Model Law (Article 20) and the UNCITRAL Rules (Article 18) use the term “place” to mean what other legal systems call “seat”. In the present matter, the Parties have confirmed that the “seat” of the arbitration shall be Easthead. The text of Article 20 makes it clear that the juridical seat of the arbitration is not necessarily where the proceedings physically take place, which is irrelevant to the present matter.
43. Furthermore, it is trite law that the law of the seat applies to the determination of the validity of the parties’ agreement to arbitrate and, therefore, the jurisdiction or basis of the entire procedure.
44. UNCITRAL Model Law, Article 16, and UNCITRAL Rules Article 23, grant the tribunal the competence to rule on its own jurisdiction. This is a natural consequence of the doctrine of separability, also contained in these articles. Article 16 provides, “*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*” The consequence of this is that the law governing the arbitration agreement may be different than the substantive law governing the contract, which in the present case is the law of Northistan.
45. Although the decisions of the courts of England and Wales are not directly applicable to the present matter, they are capable of describing general principles applicable to international arbitration. Furthermore, Article 2A of the UNCITRAL Model Law promotes uniformity of application. In *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638, the Court of Appeal explicated this concept, finding that absent express or implied choice by the parties, the law governing the arbitration agreement was the law with the closest and most real connection to arbitration agreement, which it considered a contractual provision concerned with procedure; the Court of Appeal also considered the law of the seat to be the one most closely associated with procedure, cf. the substantive law of the contract. The Court of Appeal therefore concluded that the law governing the arbitration agreement was the law of the seat.
46. The present matter strongly parallels *Sulamerica*. The Parties are incorporated in Northistan and Southland and the contract was performed in Northistan, and yet they have chosen Easthead, a neutral jurisdiction, as the seat of arbitration. Furthermore, they have chosen the EAI as their appointing authority, creating further procedural ties between the arbitration and Easthead. Finally, the subject matter of the contract was construction, not the law of real property, and thus not subject to the law of real property where that real property is located.
47. It should therefore be concluded that the law governing the arbitration agreement and the arbitration proceedings is the relevant arbitration law of Easthead. Although this statute has not been named to me, I have been told that it incorporates the UNCITRAL Model Law.
48. Pursuant to this conclusion, I find that the competent court described in Article 6 of the UNCITRAL Model Law must be the courts of Easthead.

49. The conclusion that the law of Easthead is the law governing the arbitration clause is bolstered by the citation of *Grantham and Forbes, 1824, ESC1/22/24* by the Respondent in regards to a procedural matter at the hearing held on 13 January 2022; this citation, for this purpose, was not contested by the Claimant.
50. Article 19 of the UNCITRAL Model Law states that, “*the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*” Pursuant to the Arbitration Clause, the Parties have agreed that UNCITRAL Rules shall apply. Furthermore, pursuant to their agreement at the Preliminary Hearing, the Parties have agreed to adopt the IBA Rules of Evidence.
51. Article 1(1) of the UNCITRAL Rules provides for their general applicability. However, the application of the UNCITRAL Rules is the fount upon which the selection by the Parties of the IBA Rules of Evidence is founded, and the application of the IBA Rules of Evidence is therefore subject to the fulfilment of the provisions of the UNCITRAL Rules.
52. The UNCITRAL Rules, Article 1(3) provide, “*These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*”
53. This issue is relevant, if inconsequential, in regards to the New Evidence the Claimant sought to introduce at the hearing on 11 January 2022, the introduction against which the Respondent sought to argue by citing the authority of the Easthead Supreme Court. As described below, the conclusion of the Easthead Supreme Court in *Grantham and Forbes* parallels the requirements of the IBA Rules of Evidence, Article 9(2)(b). *Q.v. sub.*

PRELIMINARY ISSUE ON JURISDICTION REGARDING NAME OF RESPONDENT

54. On 1 July 2021, the Claimant’s representative, Chloe Burns, sent to Jean James, Secretariat of the EAI and the representative of Respondent, identified at that time as “Marco Pyro, CEO Pyrontics Ltd” a Notice of Arbitration in which the Respondent was identified as “Pyrontics Ltd, Northistan, Registered Number SL23332, Hertha Ayrton Towers, Southsea, Southland, 25345”.
55. In my email on 6 July 2021 to the EAI, I stated that I had been unable to find Pyrontics Ltd in the Southland Companies Register², but that I had found Pryontics at the same address, and stated I assumed this was a typographical error. On 12 July 2021, the EAI wrote to me acknowledging the error, stating, “*Thank you for pointing out the error in the Respondent’s Company name, we have corrected it for our records.*”
56. On 15 July 2021, in response to my email earlier that day acknowledging my appointment as arbitrator, Marco Pyron wrote to me, opposing counsel, and the Secretariat of the EAI, stating that his lawyer had informed him that the arbitration tribunal had not been properly

² In this email, I myself committed a typographical error by referring to this as the “Southhand Companies Register”.

constituted due to, *inter alia*, the error in the name. He acknowledged that Jacob Tarens, CEO of the Claimant, had jokingly nicknamed him “Pyro”.

57. In this communication Mr Pyron stated that my time had been wasted. I interpreted this as a denial of my appointment.
58. In response, on 15 July 2021, I replied to this email to state that, since I had been appointed as arbitrator, I would deal with this under my authority as given in the rules and the law, giving the Respondent ample opportunity to state any objections to my jurisdiction.
59. It is undisputed that, at the Preliminary Meeting held 25 July 2021, the Respondent objected to the jurisdiction of the Tribunal, *inter alia*, because the Notice of Arbitration was written in the name of Pyrontics Ltd, which was an error and should be Pryontics. I invited the Respondent to give its jurisdictional objection in writing and noted that I would make my decision on it in due course.
60. At the same Preliminary Meeting, counsel for the Claimant expressed that it had been a typographical mistake since, as Mr Pryon had noted in his 15 July 2021 email, Mr Pryron had been referred to as Mr Pyro and that the name had been recorded incorrectly on the Claimant’s internal files. Counsel for the Claimant argued that this typographical error was not sufficient to derail the arbitration and noted that the address and registration number for the company had been given correctly in the Notice of Arbitration. Counsel for the Claimant further noted that even if there had been a critical error in the Notice of Arbitration, the Respondent could not rely on an error in the Notice of arbitration to slow down or suspend the arbitration under UNCITRAL Rules, and that it was a matter for the arbitrator to decide his or her jurisdiction.
61. In the Claimant’s Particulars of Claim, dated 1 October 2021, the Claimant referred to the Respondent by its proper name, Pryontics Ltd.
62. In the Respondent’s Defence and Counterclaim, dated 1 November 2021, the Respondent argued, “*The Claimant’s Notice of Arbitration dated 01.07.21 is not a valid Notice of Arbitration in that it fails to include all matters necessary for a valid Notice of Arbitration as required by Article 3 paragraphs 3 to 4 of the UNCITRAL Arbitration Rules, specifically that the NoA was written in the name of Pyrontics Ltd, and not the correct name of Pryontics Ltd. Consequently, the arbitral tribunal has not been correctly constituted and the arbitrator lacks the jurisdiction to proceed in this arbitration.*”
63. In the Claimant’s Reply dated 1 December 2021, the Claimant argued, “*To rely on the typographical error in the NoA to insist that the entire arbitration is void, is ludicrous.*”
64. This jurisdictional issue does not appear to have been addressed in the Hearing held in January 2022.
65. As a preliminary determination, the Respondent has complied with the requirements of Article 23(2) of the UNCITRAL Rules by raising its jurisdictional challenge in the Preliminary hearing and Defence and Counterclaim.

66. Article 23(1) of the UNCITRAL Rules provides, “*The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*” This grants me the power to rule on my own jurisdiction in this matter.
67. Article 3(2) provides, “*Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.*”
68. Article 3(3) of the UNCITRAL Rules provides, “*The notice of arbitration shall include the following: [...] (b) the names and contact details of the parties...*” (emphasis added).
69. The examination of arguments not explicitly argued before a tribunal is undertaken at best sparingly; the parties must be given the opportunity to address such arguments. However, a tribunal that does not consider the law as it exists is, tautologically, lawless. In a recent article regarding English law but expressed to contain principles of universal application, Simon Crookenden QC³ argues that cases where (a) the mistake was obvious or not such as to cause any reasonable doubt; or (b) where an agency relationship exists (e.g., as between members of a corporate group), rectification of a mistake as to the name of a party is justified.
70. In the present case, both criteria are fulfilled. The mistake in the present case is obvious, as it involves the mere transposition of two letters. Given that the Claimant correctly identified the address, jurisdiction of incorporation, registered number, and address – rendering the error easily discoverable by me – the mistake cannot cause any reasonable doubt. Furthermore, it is clear that Mr Pryon had, with whatever disdain, clearly acceded the role of agent for the Respondent under this nickname, such that the email address identification by the Claimant’s email client rendered him by this nickname automatically; its use as established by the Parties’ earlier relationship was not improper.
71. Although Article 3(3) states that the “*name*” of the Respondent must be provided, this word must be read together with Article 3(2); there is no dispute that the Respondent received this Notice of Arbitration on 1 July 2021. The purpose of Article 3(3) is to ensure certainty in arbitral proceedings, a purpose accomplished by the Claimant’s Notice of Arbitration. As the purpose of Article 3 has been fulfilled, this jurisdictional challenge must be dismissed.
72. Finally, Article 3(5) of the UNCITRAL Rules provides, “*The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.*” The Rules not explain whether such hindrance be legal or factual in nature.
73. It is of considerable concern that the representative of the Respondent took it upon himself to email me and the other concerned Parties on 15 July 2021 to deny my jurisdiction to hear this dispute; such behavior violates both the letter and the spirit of Article 3(5), which is relevant to costs determination.

³ Simon Crookenden, “Correction of the Name of a Party to an Arbitration” (2009) 25(2) Arbitration International 207

PRELIMINARY ISSUE ON JURISDICTION REGARDING ARBITRATION CLAUSE

74. The Parties have provided me with the full text of the Arbitration Clause, which reads in relevant part:

21.1 If the Parties agree to constitute a Dispute Board, and the Dispute Board fails to render a decision within 100 days of the constitution of the Dispute Board, either Party may initiate arbitration.

21.2 Provided that no Dispute Board has been constituted, or that the Dispute Board has failed to render its decision within 100 days of constitution, all disputes arising out of or in connection with this Contract shall be finally resolved by binding arbitration on an ad hoc basis between the Parties to this contract, in Easthead under the UNCITRAL Arbitration Rules.

75. The Respondent argues this means that the parties agreeing to a Dispute Board is a prerequisite to arbitration. The Claimant underlines the start of sub-clause 21.2, which states, “provided that no Dispute board has been constituted” to show that the Arbitration Clause envisages that the Parties have the option, but not the obligation to constitute a dispute board in advance of an arbitration.

76. A condition precedent is an event which must occur, unless its non-occurrence is excused, before performance under a contract becomes due, i.e., before any contractual duty arises. For a tribunal to determine that it lacks jurisdiction in the arbitration due to failure of a condition precedent, it must be clear from the wording of the arbitration agreement that the pre-conditions are not merely permissive or non-mandatory.

77. The determination of this issue turns on linguistic analysis, and the analysis put forward by the Claimant is persuasive. The words “*Provided that no Dispute Board has been constituted...*” indicates that the non-constitution of a dispute board allows a party to bring arbitration; this implies that the constitution of a dispute board is permissive.

78. It is in this light that Clause 21.1 must be read. “*If the Parties agree to constitute a Dispute board...either Party may initiate arbitration,*” describes one route to arbitration. There is no basis for reading in the words, “*If and only if the Parties agree to constitute a Dispute Board...*” The maxim of interpretation, “*expressio unius, exclusio alterius*” simply does not apply in the present case, as not only “one” has been expressed.

79. The alternative suggested by the Respondent leads to absurdity; if agreement, at a Party’s discretion (as indicated by the word “*if*”), to constitute a Dispute Board, were a prerequisite to bringing arbitration, a Party would be able to avoid the consequences of non-performance of its contract simply by refusing to agree to constitute a Dispute Board.

80. This jurisdictional challenge must therefore be dismissed.

81. Given the obvious consequence of the words, “*Provided that no Dispute Board has been constituted...*” and the absurdity of the interpretation put forward by the Respondent, it

cannot automatically be concluded that this jurisdictional challenge was brought in good faith. This will be examined when costs are considered.

**EVIDENTIAL ISSUE CONCERNING ADMISSIBILITY OF DOCUMENT
DISCOVERED BY CLAIMANT**

82. On the second day of the hearing, 11 January 2022, the Claimant asked to enter into evidence a document it had discovered on a flash drive that the Respondent had given it on which to save the hearing bundle. The Claimant stated the document had been produced by the Respondent's lawyer discussing whether both the Advance and the IPCs could be claimed. I stopped the Parties at this point and asked that no further information be disclosed about the document. I instructed the Parties to make their submissions on the admission of this document into evidence by 9 AM the next morning, 12 January 2022; I limited written submissions to 1,000 words and heard oral arguments between 9 and 10 AM that day.

83. The Claimant's position was that the document was evidence probative of the Respondent's bad faith in claiming that the Advance could be set off against the IPCs. The Claimant quoted the IBA Rules regarding admissibility of probative evidence.

84. The Respondent argued, firstly, that the document was protected by legal privilege under the Easthead Supreme Court decision *Grantham and Forbes, 1824, ESC1/22/24*; and secondly, because the document was obtained without the Respondent's permission. The Claimant argued against this, stating that it had been freely given without supervision or instruction as to its use.

85. Article 9(1) of the IBA Rules of Evidence grants the tribunal the power to “*determine the admissibility, relevance, materiality and weight of evidence.*”

86. However, Article 9(2)(b) provides,

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document statement, oral testimony or inspection, in whole or in part, for any of the following reasons: [...]

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.

87. Article 9(4) provides,

In considering issues of legal impediment or privilege under Article 9(2)(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

[...]

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

88. As the respondent have helpfully cited to me, the Easthead Supreme Court, in *Grantham and Forbes*, 1824, ESC1/22/24, stated, “*the relationship between a lawyer and his client is protected. It is imperative that they are able to speak freely without fear of these words being used in evidence.*”
89. As I have stated above, UNCITRAL Rules Article 1(3) require that they be applied, and thus the IBA Rule of Evidence be applied, unless they are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate.
90. In the present matter, the procedural law of Easthead applies, and in my reading the result in *Grantham and Forbes* expresses a fundamental principle of the procedural law of Easthead, from which the Parties cannot derogate.
91. However, it is clear that the holding in *Grantham and Forbes* and the requirements of the IBA Rules of evidence present no conflict; both reflect the principle privileging the confidentiality of legal communications found throughout the world. Parties to arbitration proceedings must be free to communicate candidly with their legal advisors.
92. It is clear from the present circumstances that the Respondent did not wish to disclose this document to the Claimant, and that such disclosure was inadvertent and unintentional. Prohibiting the admission of this document into evidence would uphold the confidentiality, and thus candour, with which the Respondent and its legal counsel corresponded.
93. The document discovered by the Claimant must therefore be held inadmissible. This tribunal refuses to admit it into evidence.

CONTRACTUAL ISSUE ON THE LIABILITY REGARDING IPCS 5-8 AND THE ADVANCE PAYMENT

Introduction

94. The present case concerns two distinct substantive matters: (1) whether the Respondent owed sums were due on IPCs 5-8, and if so, whether the Respondent is entitled to a declaration that the advance of N\$2,000,000 could cover the sums owing; and, (2) whether the Respondent is liable to the Claimant for the sums of money the Claimant expended in works on Tank Room No. 8.
95. These two issues must not be conflated. The issue of the IPCs and the status of the Advance Payment will be addressed in this section. The issue of Tank Room No. 8 will be addressed later in this award.

96. As a roadmap, this section will show that the Respondent owed monies under IPCs 5-8, and was not entitled to withhold payment on them. Because the Respondent improperly withheld payment, the Claimant was entitled to terminate the Contract; the Claimant exercised this validly, and the Respondent has not disputed the validity of the Claimant's termination of the Contract. Although the Advance Payment was issued by the Respondent to the Claimant in the form of a loan, the Advance Payment was not simply a loan to cover the operations of the Claimant, but rather to provide cash-flow during the mobilization of the works, expenditure of which value accretes to the Contract, depleting the value owing on the Advance Payment. Because the Respondent received the benefit of the Advance Payment, the sums advanced under the Advance Payment were accreted to the Contract and thus are not to be repaid. The Respondent is therefore not entitled to a declaration that the Advance Payment covers the four unpaid IPCs.

IPCs 5-8 are Due and Payable

97. Sub-Clause 14.2 of the Contract provides "*The Employer shall pay N\$500,000 on or before the 28th day of each calendar month on submission of duly certified IPCs before the 23rd day of that month.*" This creates a payment obligation for the Employer.

98. Sub-Clause 14.4 provides, "*The Contractor will make an application for an Interim Payment Certificate (IPC) on 20th day each month, along with all supporting documents. The Engineer shall determine and certify the IPC on the 23rd day of that month, as long as all conditions have been met. Payment of the IPC will be made by the Employer at the latest on the 28th day of that month.*"

99. The Engineer of Pryontics, Lesley Randal, has stated that she certified IPCs 5-8. In her statement, she wrote, "*[Work on Tank Room No. 8] did delay other scheduled works but they managed to get back on schedule before the IPC [#5] was due.... The Employer was livid [when she told him of the work on Tank Room No. 8] and told me not to certify the IPCs for anything to do with Tank Rooms 5-9. I didn't certify the Value Engineering Variation retrospectively of course but the works noted in IPC 5 had nothing to do with the Tank Room, were correct, and I duly certified it. Same with the subsequent ones until the Contractor terminated the works.*"

100. The CEO of Pryontics, Marco Pryon, writes, "*I mean, yes, things were tight with the funding being pulled, but we would have found other sources of funding, I didn't think that was a problem No, of course we stopped payment because of the works they did without permission.*"

101. Neither the Respondent nor the Claimant has adduced evidence that the IPCs were improperly claimed or certified. On this point, Jacob Tarens, Managing Director of the Claimant, stated, "*they paid...the first few IPCs, then suddenly bang, they just stopped paying with no reason and no context. No explanation of when payments would start again.*"

102. The Respondent, in its Defence and Counterclaim, admitted, "*The Respondent ceased payment because the Claimant did unsolicited works to, and around, Tank Room 8 and an investigation was ongoing as to whether the works were necessary and how to deal with the*

issue,” but has cited no provision in the Contract that would entitle it to withhold payment for the IPCs on this basis or any other. As long as they were properly claimed and certified, the Respondent’s financial obligation to pay on them was engaged. Although there was discord between the Parties as to the works on Tank Room No. 8, such does not entitle the Respondent to withhold payment on the IPCs. Indeed, it appears that the emotional reaction of Mr Pryon to issues related to Tank Room No. 8, and possibly the financial difficulties Pryontics was experiencing, induced him first to instruct the Engineer not to certify the IPCs (in breach of her own duties) and then to retaliate by withholding payment. Such provides no grounds upon which to withhold payment on the IPCs.

103. I therefore declare that IPCs 5-8 were duly certified and are payable.

Respondent in Breach due to Non-Payment of IPCs 5-8, Entitling the Claimant to Terminate the Contract

104. Clause 16 of the Contract provides for a mechanism by which the Contractor may suspend work and may terminate the Contract due to non-payment by the Engineer.

105. Clause 16.2 provides:

“The Contractor shall be entitled to terminate the Contract if: [...]

(c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the due date. [...]

In any of these events or circumstances, the Contractor may, upon giving 14 days’ notice to the Employer, terminate the Contract.

106. Interpreting this, it must be noted that the Contractor was not required to give notice of termination 42 days after expiry of a due date, but rather was entitled to terminate. The Contractor was only required to give notice 14 days before that day, even if the right to terminate would only accrue on that day. There is nothing illegitimate about sending a notice before the right accrued; indeed, to require that the right to terminate accrue before a notice could be sent would defeat the right to terminate itself. *“In any of these events or circumstances”* must therefore be read to include *“In anticipation of any of these events or circumstances,”* to give effect to the right to terminate.

107. In its Particulars of Claim, the Claimant writes at [8], *“The project finally fell apart after only 4 months because the Employer failed to pay IPC number 5 on the due date of 28.01.21 and then continued to fail to pay the subsequent IPCs. The Claimant duly gave notice to terminate the contract on 25.02.21 and terminated the contract on 01.05.21 after month 8 and 4 non-payments of the IPCs 5 through 8.”*

108. 42 days after 28 January is 11 March 2021. 14 days before 11 March 2021 is 25 February 2021. The Claimant therefore followed the procedure of Clause 16.2 without error.

109. To be sure, the Claimant waited until 1 May 2021 to terminate. There was nothing improper about this; the Claimant had given the Respondent 65 days' notice, which necessarily implies that the Claimant had given the Respondent 14 days' notice.
110. The Respondent has not disputed the validity of the Claimant's termination. The Contract was validly terminated on 1 May 2021.
111. Regarding causation and liability, the relevant right to terminate under Sub-Clause 16.2 is contingent on an unremedied breach by the Employer of its payment obligations. All other events, even those that may or may not give the Employer the right to terminate, are irrelevant and immaterial to a finding of causation and liability.
112. It is clear that the Claimant validly exercised its right to terminate the Contract under Sub-Clause 16.2. That right is created when there has been a breach by the Respondent of its payment obligations. The Respondent did not seek to terminate the contract and has not put forward any argument as to an entitlement to do so. The Respondent has merely accepted the validity of termination pursuant to Sub-Clause 16.2, and thus the Respondent must be taken to have accepted the factual allegations giving rise such a valid termination.⁴ The Respondent's statement in its written submissions, "*I would note that the project failed at quite an early state in month 8 of 24 and only very basic building work had been achieved by that time,*" has no bearing on the factual question as to whether the Advance Payment had been consumed, nor any bearing on issues of liability, viz., whether it had been validly consumed. The Respondent simply got what it bargained for.

The Nature of an Advance Payment

113. The Claimant argues in its Particulars of claim, "*The payment terms were agreed as an advance of N\$2,000,000 for the one-month mobilization, and then 48 x monthly IPCs of N\$500,000 to a total of N\$26,000,000 over the life of the 4-year project.*" In its Reply the Claimant states, "*The advance was a sum of money for mobilization to start the work.... The Claimant has the right to both the Advance and the IPCs.*" Jacob Tarens, Managing Director of the Claimant, stated in his witness statement, "*This whole thing about the Advance though was really nonsense. Everyone can tell you the Advance is a separate payment for mobilization and non-refundable.*"
114. The Respondent argues in its Defence and Counterclaim, "*...the Claimant has no case because...the Advance covers any outstanding IPCs.*" In its written submissions, it claims, "*The advance is specifically described in the contract as being an interest free loan to the Contractor. As such, it is payable if the project fails for any reason.*" However, Jackie Jones, Party Expert for Pryontics (whose testimony will be considered substantively below), states, "*I have done a forensic accounting of the monies in the Advance and have concluded that when the Contractor left the site it took with it machinery of the value N\$735,764 that it did not own at the beginning of the project. This would indicate that at least N\$735,764 of the*

⁴ Lord Atkins, in *Bell v Lever Brothers Ltd* [1931] UKHL 2, writes, "*The contract released is the identical contract in both cases: and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way: or that if he had known the true facts he would not have entered into the bargain.*"

N\$1,000,000 was of benefit to the Contractor.” These two statements indicate conflicting theories of the nature of the Advance Payment; whereas the Respondent, in the Defence, evinces a theory that the Advance Payment is merely a store of money to be repaid to it, the Party Expert appears to acknowledge that sums spent from the Advance Payment to the benefit of the Respondent accrete to the Contract.

115. Clause 14.1 of the Contract provides, *“Advance Payment. The Employer shall make an advance payment, as an interest-free loan for mobilization, of N\$2,000,000, when the Contractor submits a guarantee in accordance with this Sub-Clause on or before 15.07.2022.”*
116. It has been suggested that the Contract between the Parties has, at a minimum, been inspired by the standard-form FIDIC contract. Indeed, the language contained in Clause 14.1 resembles language found in Clause 14.2 of the 2017 FIDIC Silver Book standardized contract. However, the language of the Contract lacks any mention of repayment terms and schedule. To be sure, I have been provided only excerpts from the Contract.
117. How then is this clause, stripped bare of repayment terms, to be read? Sub-Clause 14.1 merely states, *“The Employer shall make an advance payment, as an interest-free loan for mobilization....”*
118. The purpose of an Advance Payment in a FIDIC contract is to provide a contractor sufficient liquidity, i.e., cash flow, in order to mobilise its resources and commence work on a project. As the purpose of the Advance Payment is to provide the Contractor cash flow (i.e., to maintain its outflows), monies expended from the Advance Payment are necessarily to the benefit of the Employer. In all editions of FIDIC contracts, this Advance Payment is then “repaid” over the course of the project in installments. Whereas in the Red and Yellow books, it is repaid by a system of certificates, in the Silver book, it is “repaid” out of funds owing to the contractor, i.e., the IPCs.
119. However, this “repayment” is merely an accounting device. In reality, where an Advance Payment has been paid, the values of the IPCs are correspondingly lowered. This reflects a repayment schedule, where the Advance Payment is repaid at a steady rate. Indeed, although the language of “interest-free loan” might be used, it is entirely possible that a schedule of IPCs might simply reflect the repayment without a need to mention it.
120. Furthermore, a repayment schedule is merely an amortisation schedule whereby the initial Advance Payment is written off over the course of the project. It is in this way that accounting practice and reality diverge; it could well be the case that the entire Advance Payment is consumed in ways that benefit the Employer early in a project. Indeed, the presumption apparent in the Contract that the deductions from the IPCs correspond to the actual consumption of portions of the Advance Payment, is weak at best, and readily rebutted with actual evidence; it is virtually impossible that the Advance Payment would be consumed at a steady rate, given the vagaries of a complex construction project.
121. It is for this reason that the characterization put forward in the Respondent’s Defence must be rejected out of hand; if the entire sum of money would need to be repaid, presumably

upon completion of the Project or issuance of a Certificate of Completion, that the Contractor would receive a windfall in the form of the time-value of the money over the course of the Project, greater than the time-value of the money the Employer would receive had the Advance Payment been repaid in installments over the course of the Project (assuming, as we must, that the Employer expected the Project to be completed). In other words, this is a commercially absurd interpretation of the Advance Payment term. This absurdity is compounded by the requirement of an Advance Payment Guarantee, procured by the Contractor, unchanging in size over the course of the Project, on commercial terms profitable to the bank or other guarantor providing the Guarantee, who would therefore capture that time-value from the Contractor. Why would an Employer transfer that time-value to the guarantor, when it could require the Contractor simply to take out a loan from a bank?

122. Furthermore, the Respondent's characterization flies in the face of commercial practice. In reality, advance payment guarantees are themselves reduced in value, and payments of profits representing interest are correspondingly reduced in value, over the course of the Project. The Employer does indeed transfer some time-value to the Contractor and guarantor, but in ever-decreasing amounts as the Project progresses and the Contractor's cash flow is restored after mobilization.
123. The characterization put forward by the Claimant and Mr Tarens is an incomplete "projection"⁵ of the more complete nature of the Advance Payment. If the project is completed, then there should be no Advance Payment to repay, as it has been amortised over the course of the Project. However, if the project is not completed, then the deductions from the IPCs may not represent the actual amounts of Advance Payment consumed in the partially completed Project. The Claimant's claim that it is *a priori* entitled to the entirety of the Advance Payment must also be rejected as conceptually flawed; the Advance Payment was indeed a loan, not a separate payment for mobilization.
124. However, the legal authority put forward by the Claimant, *Kierste and Bekir, 2014, NCA/99/2014*, confirms the analysis above, wherein Honourable Judge Abdul Brakier stated, "*Where a project fails before it is completed, the Advance should be proportioned as to what has benefitted the Employer.*" This Northistan judgment is applicable to the substance of the dispute.
125. The characterizations put forward by the Claimant's expert witness and the Defendant's expert witness evince the same, correct, interpretation of the nature of the Advance Payment, though they differ as to the degree to which the Advance Payment in the present case has been consumed (addressed below). Each addresses the question as to the degree to which the Advance Payment has been applied to the Project, and thus the Respondent.
126. It is for this reason that I must use my powers of rectification to rectify the present Contract. It is clear, by virtue of the fact that it lacks any mention of repayment terms or time-frame, that it lacks all terms agreed by the Parties as to the nature of the Advance Payment. Adopting the most conservative interpretation of the Parties' intention, evinced by their neglect to put a repayment schedule into their contract, it is clear that the monthly sums

⁵ In the geometrical sense that a circle is a projection of a sphere onto two-dimensional space.

of the IPCs in Clause 14.2 reflect sums that have already been adjusted to take account of repayment of the Advance Payment.

127. In the alternative, I must use my powers of interpretation of this Contract to identify an implied term in this contract. In *Equitable Life Assurance Society v Hyman* [2000] UKHL 39, which it is argued is of general application, the House of Lords of the United Kingdom found that a term needs to be implied when it is necessary to give effect to the reasonable expectations of the contracting parties. In light of this Contract's inspiration from the FIDIC contracts and the commercial absurdity of the Respondent's interpretation on a bare reading of the words of the contract, it is necessary to imply a term to the effect that the monthly sums of the IPCs in Clause 14.2 reflect sums that have already been adjusted to take account of repayment of the Advance Payment.
128. At the same time, it is necessary to imply a term that repayment of unconsumed Advance Payment is accelerated upon early termination of the Contract. Upon termination, the Employer derives no benefit from supporting the cash-flow of the Contractor, and would lose the time-value of this money if it need not be paid back immediately; even a schedular repayment would lead to commercial absurdity.
129. I therefore hold that the Advance Payment may not, in principle, be used to cover the outstanding IPCs; should it be found that not all of the money advanced under the Advance Payment has been consumed and accreted to the Contract, that money may be used to pay unpaid IPCs by way of set-off.

Evaluation of Expert Reports regarding Consumption of Advance Payment

130. Two factual accounts as to the consumption of the Advance Payment have been presented: the first from Evan Llywd, party expert for the Claimant; the second from Jackie Jones, party expert for the Respondent.
131. From the outset, I must make it clear that I have been presented with only two factual assertions as to the degree to which the Advance Payment has been consumed to the benefit of the Respondent. It is not open to me to "split the difference". Article 28 of the UNCITRAL Model Law and Article 35 of the UNCITRAL Rules both provide, "*The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*" The Parties have not granted me this power.
132. Article 27 of the UNCITRAL Rules provides:
- 1. Each party shall have the burden of proving the facts relied on to support its claim or defence.*
 - 2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.*

[...]

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

133. Evan Llywd, for the Claimant, stated, *“I have done a forensic accounting of the use of the Advance and find that the Advance was used entirely for the benefit of the Employer, and as such, the Advance should be considered as part of the due amounts in addition to the IPCs.”* The phrase “due amounts” is perhaps unfortunate, but it is clear that Mr Llywd meant that the value of the Advance Payment was due to the Claimant; as it had already been paid to the Claimant, it of course need not be paid again.
134. Jackie Jones, for the Defendant, stated, *“I have done a forensic accounting of the monies in the Advance and have concluded that when the Contractor left the site it took with it machinery of the value N\$735,764 that it did not own at the beginning of the project. This would indicate that at least N\$735,764 of the N\$1,000,000 was of benefit to the Contractor.”*
135. At the time of the hearing, I noted that the Respondent’s expert opinion was submitted to the parties, but the Claimant did not make any comment on this matter. In the Hearing, I asked Claimant’s counsel if they would like to comment and received the answer, *“I have no instructions on this point.”* I looked at the Claimant Party but there was no answer and I continued the Hearing.
136. Article 5 of the IBA Rules concerns Party-Appointed Experts, and requires that an expert report be accompanied by *“a description of his or her background, qualifications, training and experience.”*
137. Article 9 of the IBA Rules provides, *“The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.”*
138. None of the experts’ testimony is entirely satisfactory:
 - 138.1. I have no explanation why Claimant’s counsel had no instructions regarding the issue of the machinery;
 - 138.2. I have no explanation why the Claimant did not provide instructions to its counsel during the Hearing;
 - 138.3. Ms Jones is described as an expert on FIDIC contracts, and nothing indicates she was qualified to undertake forensic accounting;
 - 138.4. The testimony of Mr Llwyd is vague;
 - 138.5. The Respondent appears to have claimed exceptional costs, at least in part attributable to its expert witness.
139. I must therefore decide whose testimony I find more credible.

140. On balance, I find the testimony of Mr Llwyd more credible.

140.1. Most importantly, Mr Llwyd is described as “*an expert in delay damages and commercial financing*”. Ms Jones is described as “*an expert in FIDIC type contracts*”, which appears to make her qualified to consider liability, but not quantum, and makes her as qualified as I am to undertake forensic accounting. In other words, Ms Jones does not appear to have the training necessary to undertake forensic accounting; her testimony is fruit from a less-healthy, if not poisoned, tree.

140.2. Although costs at least in part attributable to Ms Jones are exceptional and unexplained, I find that this has no bearing on her credibility.

140.3. Although Mr Llwyd’s conclusion may be vague, I attach no importance to the apparently exact figures Ms Jones produces; indeed, considering a rhetorical strategy appealing to *logos*, the use of supposedly exact figures can exert a powerful psychological attraction of which it is best to be sceptical. Without corroborating evidence, Ms Jones’s account is just as vague Mr Llwyd’s.

140.4. No rule of evidence allows me to make an adverse inference from the silence of the Claimant during the Hearing. It is clear that the Claimant’s expert witness had already addressed the issue of the consumption of the Advance Payment in his expert report. Although counsel stated it had no instructions, it is clear that the Claimant had already provided an answer to this assertion by the Respondent. Any number of explanations for this event is possible: counsel may have forgotten, however temporarily, that this point had been addressed in Mr Llwyd’s report; lay representatives for the Claimant may not have been following proceedings carefully and may not have understood what was happening; or they may have not understood that my gaze was an instruction for them to give counsel instructions. Indeed, it may have been the case that the figures presented by Ms Jones were so disconnected from reality that the Claimant’s representatives did not know how to answer them.

141. On balance, I believe the testimony produced by Mr Llwyd is more credible than that of Ms Jones. My principal reason for concluding this is that Mr Llwyd is qualified to undertake forensic accounting, whereas Ms Jones does not appear to be. Ms Jones’s written testimony simply cannot be characterized as an “expert testimony”.

142. The testimony produced by Mr Llwyd is therefore approved.

Conclusion: The Respondent May Not Use the Advance Payment to Cover Sums Owing on IPCs 5-8

143. The elements described above must now be assembled:

143.1. IPCs 5-8 were validly claimed and certified, and thus owing.

143.2. The Claimant validly terminated its Contract, and should not suffer any prejudice from this.

- 143.3. The Advance Payment was an interest-free loan for the purpose of supporting the cash flow of the Claimant during the initial stages of the Project. As the Advance Payment was to be amortised, in principle it was not available to cover unpaid IPCs, though sums not consumed could be employed via set-off for that purpose.
- 143.4. The Advance Payment was to be amortised over the course of the 48 months of IPC payments, which, by way of a necessary implied term, had been reduced to reflect that repayment.
- 143.5. The amortization of the Advance Payment was a (fictional) accounting technique based on the expectation that the Project would be completed. Analysis of the consumption of the Advance Payment is instead a factual inquiry.
- 143.6. On balance, the assertion by Mr Llwyd that the entirety of the Advance Payment had been consumed in the first eight months of the contract is the most credible account.
- 143.7. The Advance Payment had been entirely consumed and therefore was unavailable as funds to set off payment on unpaid IPCs.
144. I find therefore that IPCs 5-8 remain outstanding, and I declare that the Respondent is liable for a total of N\$2,000,000.

CONTRACTUAL ISSUE ON LIABILITY REGARDING TANK ROOM NO. 8

Introduction

145. In contrast to the previous section, this section is heavily dependent on the facts adduced by the Parties.
146. Although the Claimant was not entitled to undertake a variation without following the procedures contained within Clause 13 of the Contract, the Claimant was entitled to, and in effect required to, mitigate its loss and attempt to fulfil its general contractual duties upon the breach of contract by the Respondent, as Employer, and the Engineer. Both the Respondent and the Engineer, an employee of the Respondent, breached the Contract by engaging in acts of negligence and negligent performance of contractual duties between the start of work and the moment the Claimant, as Contractor, instructed its staff to engage in efforts to mitigate its loss from these breaches and fulfil its general contractual duties. This account provides a better explanation of the Claimant's response to events than those insinuated by the Respondent. The Claimant's response to events was reasonable in the circumstances, and on general principles the Respondent is liable for the costs of the Claimant's efforts at mitigation.

Variation Procedure

147. Clause 13 of the Contract provides for variation of the works of the contract.
- 147.1. Sub-Clause 13.1 provides the Engineer the right to initiate variations.

- 147.2. Sub-Clause 13.2 provides the Contractor the ability to propose Value Engineering Variations to the Engineer; this clause does not impose a duty on the Engineer to accept the proposal.
- 147.3. Sub-Clause 13.3 provides for a procedure by which variations would be adopted. This imposes rights and duties on both the Engineer and the Contractor.⁶
148. Sub-Clause 4.4 imposes a general duty of care upon the Engineer and the Parties when making determinations regarding variations and other matters; *“the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not reached, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. The Engineer shall give notice to both Parties of each determination. Each party shall give effect to each determination unless and until revised under clause 21 [Arbitration].”*
149. Immediately a tension within Sub-Clause 4.4 can be seen; even if the Engineer is in breach of its duty to make a fair determination, it does not appear that the duty of a party to give effect to that determination until arbitration revises it is suspended. However, the Respondent has not alleged that the Claimant has breached its duty under Sub-Clause 4.4 and does not in any other way rely upon it. Pursuant to Article 27(1) of the UNCITRAL Rules, the burden rests with the Respondent to prove facts to support its defence; the Respondent has not done this and I find this possible argument waived by the Respondent.

Negligence of Employer and Engineer

150. It is a cardinal principle of virtually all legal systems that a duty to execute contractual duties at a level of reasonable care and skill. This is found in both common law jurisdictions and in civil law jurisdictions, and although no authority as to the application of this principle in Northistan has been cited to me, I believe I am entitled to find that this in the present circumstances without offending principles of natural justice or the New York Convention.
151. Should a party be found to have performed its contractual duty negligently, that party will accordingly be found to have breached its contract.
152. On multiple occasions, both the Employer and the Engineer performed their contractual duties negligently. On several of these occasions, the negligence was so obvious as to appear imperceptible. The following record corrects that.

Failure by Employer to Produce Workable Building Plans, c. August 2020

153. On 1 July 2020, the Parties entered into the Contract and the Claimant duly mobilized over the following month. In its Particulars of Claim, the Claimant writes, *“However, the design for Tank Room 8 was a major problem. The original design had been changed to*

⁶ Sub-Clause 13.3 mistakenly refers to “Sub-Clause 3.5 [Determinations]”, when it should in fact refer to Sub-Clause 4.4. I hold Sub-Clause 13.3 rectified to remedy this.

include a stairway and mezzanine and because of these changes, the machinery designated for Tank Room 8 was not going to fit.”

154. At the Hearing, I inspected the artist’s impression; the machinery would indeed have to pass through the mezzanine and stairs and would be impossible to fit into the Employer’s design. I enquired as to the agreement of the Parties that this was the actual design of the Employer and that the me machinery was the assigned machinery. The Parties agreed it was.
155. Although not presented in the extracts from the Contract with which I have been presented, it is clear that the Respondent as Employer had the duty to produce plans for the project.
156. *Res ipsa loquitur* is a phrase that means “the thing speaks for itself”. If the plans produced by the Employer were physically impossible to build, I do not need to inquire into the mind of the Respondent to find negligence. Plans for works that are impossible simply demonstrate without more a lack of reasonable care and skill in their preparation.

Failure by Engineer to Address Concerns in Month 2, c. September 2020

157. Lesley Randal, Engineer for the Respondent, states, “*The Claimant told me that the designs for Tank Room 8 were wrong back in month 2.*” I interpret “Month 2” to mean September 2020, as the works commenced August 2020.
158. It is at this point that I am capable of peering into the mind of the Respondent, who was at this point at least constructively aware of the problems with Tank Room No. 8.
159. As the Respondent was under a continuing contractual duty to produce building plans capable of being built, the Respondent was in breach of contract when the Claimant made its concerns known.

Negligence and breach of contract under Sub-Clause 13.1

160. Sub-Clause 13.1 states, “*The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating that... (ii) it will reduce the safety or suitability of the Works. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.*”
161. By the Engineer’s testimony, it is clear that the Claimant gave notice to the Engineer.
162. First, it is clear that the Engineer executed its duty to “confirm” the instruction negligently, as the Engineer confirmed building plans that were incapable of being built.
163. Second, it is clear that this constitutes a Determination that the Engineer executed in breach of its duty to make a fair determination, taking due regard of all relevant circumstances, pursuant to Sub-Clause 4.4. The fact that the plans were incapable of being built indicates the Engineer did not take due regard.

Negligence and breach following 5 October 2020

164. By both the Claimant's Particulars of Claim and the Engineer's testimony, the Claimant repeated its concern to the Engineer on 5 October 2020.
165. There is a factual dispute as to what happened next. The Claimant states in its Particulars of Claim, "*The Engineer did not reply...*" whereas the Engineer states, "*it was 5th October, but the works were not even nearly to that stage at the time and we agreed to park the matter until the time came.*"
166. If the Engineer's account is taken as fact, general negligence and breach of Sub-Clause 4.4 are again found. Although the Claimant appears to agree to hold off enforcing this duty, no contractual right to withhold performance, estoppel or similar legal mechanism is pleaded.
167. If the Claimant's account is taken as fact, general negligence and breach of Sub-Clause 4.4 are again found, exacerbated by the Engineer's conscious, i.e., reckless, refusal to deal with the matter.

Value Engineering Variation Request and Response

168. On 8 October 2020, the Claimant submitted a Value Engineering Variation request pursuant to Sub-Clause 13.2. The Claimant stated it did this because it had not heard from the Engineer; the Engineer stated she was "*really confused*" because of her earlier understanding of things.
169. The Engineer claims that she "*took it to the Employer and explained the problem was probably very real but that we were not at the stage of building Tank Room 8 yet anyway.*"
170. Possibly concerning this two-day period, Marco Pryon states, "*We never said that the works to Tank Room 8 were unnecessary but the Claimant did not give us full opportunity to investigate and do a cost analysis....*"
171. On 10 October 2020, according to the Claimant, "*The Engineer replied on 10.10.20 saying that the Contractor was not responsible for design work and had to build as designed.*" Jacob Tarens confirmed this in his witness statement.
172. It is possible to evaluate the actions of the Engineer against contractual requirements.
- 172.1. Pursuant to Sub-Clause 13.3, it is true that the Engineer responded "*with approval, disapproval, or comments,*" albeit in a perfunctory manner.
- 172.2. Pursuant to Sub-Clause 4.4, the Engineer was under a duty to "*consult with each party in an endeavour to reach agreement.*" The Engineer did consult with the Respondent, but does not appear to have engaged the Claimant. Whether the Engineer endeavoured to reach agreement is ambiguous.
- 172.3. Pursuant to Sub-Clause 4.4, the Engineer was under a duty to "*make a fair determination in accordance with the Contract, taking due regard of all relevant*

circumstances.” Once again, the Engineer has failed to fulfil its duties under this clause. The plans remained impossible to build; instructing the Claimant to “*build as designed*” does not evince “*due regard*”. The Engineer cannot also be said to have exercised her duties with reasonable care and skill by endorsing plans that by their nature frustrate the Contract.

Late October 2020 Events

173. After this rejection, the Claimant and its representatives apparently made further attempts to deal with this problem, stating it had “*tried very hard to get the Engineer to come and see the room and the problem and to show him the work-around but he said he was too busy and refused to even discuss the problem.*”
174. This evinces further violation of the Engineer’s duties under Sub-Clause 4.4 and general principles.

Summary of Negligence and Negligent Breach of Contract

175. During the period between 1 July 2020 and 1 November 2020, the Employer and the Engineer engaged in a course of conduct that created the problems associated with Tank Room N. 8, prevented the Parties from sorting out the problems associated with Tank Room No. 8, and obfuscated and mischaracterized the problems associated with Tank Room No. 8.
176. During this time, the Claimant fulfilled its procedural obligations under Clause 13.

Claimant’s Actions Flow from Engineer’s Negligence

177. On 1 November 2020, the directors of the Claimant gave the ground team instruction to go ahead with the proposed changes to Tank Room No. 8.⁷
178. The Claimant was motivated by a desire to prevent delays to the Project and its performance of its obligations under the Contract. In the Particulars of Claim, the Claimant stated that it had explained to the Respondent that the changes “*had been made to prevent any delay in the project.*” In his witness statement, Mr Tarens states, “*They simply didn’t listen to us. Work was moving on and if we didn’t deal with Tank Room 8, we would have fallen behind schedule. We had no choice and got on with the work.*” In the Claimant’s oral submissions, it states, “*There was no other way of achieving the remit and any delay would have had a knock on effect of delaying other words in the project.*”
179. On 3 November 2020, the Claimant wrote to the Employer directly, who wrote back to say that the changes were unsolicited, that they should not have been undertaken without permission, and would not be compensated.
180. From the perspective of the Claimant, the Respondent and the Engineer engaged in a course of conduct that constituted breach of contract and, without modification, would frustrate the Contract. The Claimant had been given no assurances that at some later point,

⁷ This is contrary to the assertion by the Engineer that they had been done in the last two weeks in October 2020.

the issue with Tank Room No. 8 would be dealt with; rather, the Claimant was repeatedly told it would have to build according to plans that were impossible to follow. Undertaking the revised works appeared to be the only option available to the Claimant.

Claimant's Actions were Reasonable in the Circumstances

181. Mitigation is a principle of law found in both common law and civil law systems. On orthodox principles, it is not exactly a “duty”, but rather a statement that damages will be measured based on the actions a reasonable person would take in the claimant’s position. A reasonable person would attempt to prevent the consequences of a breach of contract or other duty from compounding. This is measured within a certain margin of appreciation; it does not require that perfect or flawless mitigation efforts be effected, but merely that they be reasonable.
182. The Claimant cites *Thacket and Grimes, 1987, NCC/122/87* in which Judge Harmond stated, “*the performer of the work has an ongoing duty to mitigate damage wherever it may be found and reasonable compensation for such mitigation must be forthcoming.*”
183. Against this, the Respondent argues, “*there was no damage in the matter of Tank Room 8 and as such there was no duty to mitigate.*”
184. The submission by the Respondent is severely misguided, as it appears to believe the word “damage” concerns only physical damage. Rather, “damage” defined much more broadly to include all legal and material prejudice suffered by a claimant. Delay itself is a considerable head of damage. In the present case, other damage that could have flowed from continuing delays could include:
 - 184.1. lost opportunity costs, including other construction contracts;
 - 184.2. disruption of business plans and disruption to relationships with suppliers, subcontractors, and other contracting parties;
 - 184.3. disruption to employees’ personal lives;
 - 184.4. excess payments on the Advance Payment Guarantee and other financial instruments;
 - 184.5. reputational damage from not completing the Project on time;
 - 184.6. all other manner of direct and consequential loss.
185. Given these and other potential consequences, it is clear that the duty to mitigate loss under *Thacket* applies to the present case.
186. It is clear from the Parties’ submissions that the Claimant’s actions were reasonable.
 - 186.1. The Respondent stated, “*The internal investigation concluded that the unsolicited works done to Tank Room 8 were not desirable but did improve the design to a certain*

degree; certainly not to the extent of the “costs” quoted by the Claimant. We will provide expert evidence to this effect.” However, the Respondent did not provide expert evidence to that effect.

186.2. Jackie Jones stated, “*The works done to Tanks Rooms 5 through 9 were a good solution to the defects in the designs but there may have been cheaper alternatives that satisfied the needs of the Respondent. For example, it may have been viable to remove Tank Room 8 entirely and downsize the project. This may have been a good solution for the Respondent particularly given the funding problem.*” This statement, by the Respondent’s expert witness, shows that the mitigation efforts done by the Claimant were “reasonable” if not “perfect.

186.3. The Engineer acknowledged, “*the Contractor...did works to Tanks Rooms 5 through 9...to solve the design problem in Tank Room 8.*” This acknowledges that they did indeed solve the design problem.

186.4. The Claimant’s expert witness states, “*I can confirm that the works done to Tank Rooms 5 through 9 to compensate for the errors in the Employer’s design of Tank Room 8 were necessary and certainly the cheapest option for making good on the design.*” Although it was improper for the expert to comment on the Employer’s liability, this witness confirms that the works done were reasonable.

187. The Respondent’s characterization that the Claimant “went rogue” and did whatever it wanted at whatever price is simply false. It was forced to confront a situation where the Respondent and the Engineer had apparently frustrated the Contract by means of multiple breaches of contract. It did what was reasonably necessary, and it did it, according to multiple witnesses, at a fair price.

188. I therefore find that the Claimant engaged in reasonable mitigation efforts consequent to the Respondent’s multiple breaches of contract, for which it is entitled to be compensated pursuant to the holding in in *Thackett*.⁸

189. Finally, the Respondent’s reliance on *Angcleric and Booth, 2001, NCA/21/2001* is misguided. The judge in this case stated, “*a contractor cannot simply decide to make changes to the works designed by the employer, the employer must be given opportunity to decide how to handle problems that arise during the process.*” It is clear that the Employer was given ample opportunity to decide how to handle problems over the course of three months; the Respondent chose not to take those opportunities, and indeed made the situation worse by insisting that the Claimant attempt to fulfil impossible plans without discussion.

⁸ Additionally, Sub-Clause 13.3 provides, “*The Contractor shall not delay any work whilst awaiting a response.*” In the present circumstances, it is clear that most work had been delayed (or rendered impossible) due to the Respondent’s actions, yet the Claimant remained under a duty to continue working. The Claimant was therefore put in an impossible position, and – admirably – chose to continue to work and fulfil its obligations.

Alternative Explanations Rejected

190. There is some insinuation in the Respondent's statements that the Claimant had created an artificial urgency to the need to remedy design defects regarding Tank Room No. 8.
- 190.1. Mr Pryon states, *"We never said that the works to Tank Room 8 were unnecessary but the Claimant did not give us full opportunity to investigate and do a cost analysis, there may have been a better work around for it but they just went ahead and did the work unsolicited."*
- 190.2. The Engineer states, *"but the works were not even nearly to that stage at the time"* and *"we were not at the stage of building Tank Room 8 yet anyway. The Contractor though made some changes to the work schedule to deal with the Tank rooms earlier than scheduled and did works to Tanks Rooms 5 through 9 over the last two weeks in October, to solve the design problem in Tank room 8."*
191. The insinuation apparent to me is that the Claimant was somehow aware of the Respondent's loss of financial support, and rushed to undertake mitigation works that expanded the scope of the Project before the consequences of that manifested, enabling the Claimant to secure financial benefits before any questions as to solvency arose.
- 191.1. It is true that Mr Tarens stated, *"Of course, it turns out that their inability to pay had nothing to do with our "unsolicited" work or anything to do with us, but rather that their funders cut the funding for the project. I mean we knew of course but the funders were nothing to do with us, that's Pyro's business not mine, we never mentioned it."* This statement does not indicate when exactly he discovered that the Respondent had lost its funding. It appears to indicate discovery of this fact after the mitigation works on Tank Room No. 8 had been undertaken, and appears to convey a rejection of this as an excuse. On its face this does not constitute an admission that he had taken advantage of the Respondent's financial difficulties.
- 191.2. More straightforward evidence comes from Mary Bell, secretary to Mr Tarens, who indicates that she learnt of the loss of funding at a Christmas party, which puts her discovery of this fact approximately seven weeks after the Claimant undertook the mitigation works. Imputation of knowledge in either direction between Mr Tarens and his secretary is best avoided as speculation, but an inference can be made that it is at least possible that neither knew about this development until the Christmas party.
192. On balance of probabilities, this insinuation, and its effects on the mitigation analysis above, should be rejected. A responsible contractor would be more interested in ensuring the long-term viability of the project, rather than securing a short-term financial gain that further imperiled the financial status of its employer; after all, a long-term strategy would ensure greater financial returns.
193. Finally, there has been insinuation from the representatives of the Claimant that the principal motive of the Respondent in opposing payment for the mitigation works was their own knowledge of their precarious financial state. This may well be true, but is irrelevant to

the present analysis; no element of good faith in the contract law of Northistan has been adduced to me, and the Respondent remains free to base its legal theories on the rights it asserts.⁹

Summary: Respondent's Liability for Mitigation Costs

194. To summarize, it is not on the basis of the variation procedures in Sub-Clause 13.2 that the Claimant bases its claim for compensation for the works it did to remedy design defects regarding Tank Room No. 8, but rather in the principles of mitigation as expressed in the general law and in the decision in *Thackett*. The Claimant's mitigation efforts were consequent to the Respondent's multiple breaches of contract. On all evidence adduced, by both parties, these efforts should be considered reasonable. The Claimant does not appear to have undertaken these mitigation efforts in order to exploit the Respondent's financial weakness for short-term gain.

195. Pursuant to the decision in *Thackett*, the Claimant is entitled to just compensation for its mitigation efforts.

Quantum

196. There is little disagreement as to the value of the works done by the Claimant.

196.1. In its Particulars of Claim the Claimant sought only material costs, not workmanship, and therefore seeks N\$1,000,000.

196.2. Mary Bell costed the work at N\$1,232,532.21, which included N\$225,000 for workmanship. This leaves N\$1,007,532.21 for materials, which is greater than what is claimed. Ms Bell is not an expert.

196.3. Evan Llywd, an expert in delay damages and commercial financing, conducted forensic analysis and confirmed that the figures produced by Ms Bell are correct.

196.4. Jackie Jones, expert witness for the Respondent, states that the works done were "a good solution" but there "may have been cheaper alternatives..." Ms Jones therefore does not dispute the accuracy of the figures.

196.5. Although the Respondent declared in its Defence that it did not believe that Tank Room No. 8 was improved to the level of costs claimed by the Claimant, and stated that it would provide expert evidence to this effect. However, Ms Jones did not accomplish this for the Respondent. In written submissions, did not address this directly, stating, "*Whilst it may be true that the Contractor's new designs would have been correct and allowed the full functionality, the actual building work achieved with this N\$1,000,000 did not include the mezzanine or stairways or any of the machinery housing etc let alone the machinery itself.*" It remains ambiguous as to the degree to which the Respondent

⁹ For a dramatic illustration of this principle, the reader is directed to *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8.